

1985

The Unconstitutionality of State Insurance Takeover Statutes: An Unfortunate but Not Necessairly Final Result

John M. Sheffey

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Sheffey, John M., "The Unconstitutionality of State Insurance Takeover Statutes: An Unfortunate but Not Necessairly Final Result" (1985). *Minnesota Law Review*. 1649.
<https://scholarship.law.umn.edu/mlr/1649>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

The Unconstitutionality of State Insurance Takeover Statutes: An Unfortunate But Not Necessarily Final Result

John M. Sheffey*

The Supreme Court's decision in *Edgar v. MITE Corp.*,¹ together with the adoption by the Securities and Exchange Commission of Rule 14d-2,² brought to a close the long-standing debate over the constitutionality of "first generation" state takeover laws.³ In *Edgar* the Court held that the Illinois Business Take-Over Act was unconstitutional under the commerce clause because the burden it imposed on interstate commerce outweighed its putative local benefits.⁴ Although only a plurality of the Court agreed that the Illinois statute also was invalid because it was preempted by the Williams Act,⁵ the SEC's promulgation of Rule 14d-2 has created such a direct conflict with the substantive provisions of the state takeover laws as to preempt them under the supremacy clause.⁶ *Edgar* generated considerable controversy regarding the continuing viability of state efforts to regulate takeovers of general business corporations.⁷ This Article, however, focuses on whether and to what extent

* Associate Dean and Associate Professor of Law, University of Arkansas at Little Rock School of Law.

1. 457 U.S. 624 (1982).

2. 17 C.F.R. § 240.14d-2(b) (1984).

3. "First generation" business takeover laws are those adopted prior to *Edgar*, as opposed to "second generation" statutes, which were subsequently enacted or amended in response to *Edgar* and Rule 14d-2.

4. 457 U.S. at 643-46; see *infra* notes 24-31 and accompanying text. A plurality of the Court held that the statute also was unconstitutional as a direct regulation of commerce. 457 U.S. at 641-43.

5. 457 U.S. at 630-40; see *infra* notes 32-50 and accompanying text.

6. See *infra* notes 51-55 and accompanying text.

7. See Profusek & Gompf, *State Takeover Legislation After MITE: Standing Pat, Blue Sky or Corporate Law Concepts*, 7 CORP. L. REV. 3 (1984); Note, *The Unsung Death of State Takeover Statutes: Edgar v. MITE Corp.*, 24 B.C.L. REV. 1017 (1983); Note, *Corporate Battles for Control—Edgar v. MITE and the Constitutionality of State Takeover Legislation—The Continuing Saga*, 26 HOW. L.J. 1425 (1983); Note, *A Failed Experiment: State Takeover Regulation After Edgar v. MITE Corp.*, 1983 U. ILL. L. REV. 457 (1983); Note, *Post-MITE: The Constitutionality of State Takeover Acts*, 40 WASH. & LEE L.

the analogous takeover provisions of state insurance holding company acts survive these developments.

Like the more general state business takeover laws, state acts regulating a holding company's ability to acquire control of insurers are a relatively recent phenomenon. By the late 1960's, inflation, decline in underwriting profits, and strong competition from the financial community led insurers to either form or be acquired by holding companies.⁸ Through the diversification permitted by such affiliations, insurers could engage indirectly in activities prohibited by restrictive regulations imposed on them as insurers.⁹ Concerned that excessive diversion of insurance assets into unregulated activities would jeopardize the insurers' solvency and the policyholders' security,¹⁰ the National Association of Insurance Commissioners (NAIC) adopted a model Insurance Holding Company System Regulatory Act in 1969.¹¹ Most states have adopted insurance holding company acts,¹² usually patterning their bills after the Model Act.¹³

REV. 1227 (1983); Comment, *Edgar v. MITE Corp.: Is the Pre-Emption of State Takeover Statutes Complete?*, 1983 UTAH L. REV. 415.

8. Seiler, *Regulation of Upstream Holding Companies and Its Development*, 1969 AMERICAN LIFE CONVENTION LEGAL SEC. PROC. 323, 324-25.

9. See REPORT OF THE INDUSTRY ADVISORY COMMITTEE TO THE (D1) SUBCOMMITTEE OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS ON HOLDING COMPANY LEGISLATION, reprinted in I 1969 N.A.I.C. PROC. 175, 176-77 [hereinafter cited as INDUSTRY ADVISORY COMMITTEE REPORT]; Barger, *The Insurance Holding Company: The Aftermath—Living with the Legislation*, 1970 A.B.A. SEC. INS., NEGL. & COMPENSATION L. 185, 186; Kemper, *Insurance Holding Companies: Economic and Management Factors*, 1969 A.B.A. SEC. INS., NEGL. & COMPENSATION L. 323, 324-27; Seiler, *supra* note 8, at 324-25; Wolke, *Curing the Cure—Insurance Holding Companies*, 6 FORUM 95, 100-02 (1971); Wolke, *Insurance Companies as Parents and Subsidiaries*, 1970 A.B.A. SEC. INS., NEGL. & COMPENSATION L. 166, 166-69 [hereinafter cited as *Parents and Subsidiaries*].

10. Barger, *supra* note 9, at 186-87.

11. INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT—MODEL LEGISLATION, reprinted in II 1969 N.A.I.C. PROC. 738 [hereinafter cited as MODEL ACT]. A copy of § 3 of the Model Act, which governs acquisitions of control of insurers, is included as an Appendix to this Article.

12. See Dew, *The Insurance Holding Company Systems Regulatory Act—What Does the Future Hold?*, I 1983 N.A.I.C. PROC. 100, 100 (some variant of Model Act adopted in 48 jurisdictions); Schwing, *Insurance Holding Company Regulatory Statutes and Related Legislation: A Comparative Analysis*, 27 FED'N INS. COUNS. Q. 96, 109 & n.52, 110 nn.54-55 (1976) (citing acquisition of control provisions from 44 state statutes); Note, *State Insurance Takeover Acts: A Constitutional Analysis After Edgar v. MITE*, 59 IND. L.J. 255, 261 & n.29 (1984) (42 states have enacted legislation governing acquisition of control of insurance companies).

13. Only Colorado, Montana, Pennsylvania, and New York enacted insur-

The Model Act and state insurance holding company acts place stringent requirements on holding companies attempting to acquire control of insurers.¹⁴ These acquisition of control provisions (hereinafter referred to as "insurance takeover statutes") require holding companies seeking to gain control¹⁵ of a domestic insurer, through either a tender offer or some other agreement, to deliver a disclosure statement to the state insurance commissioner and the insurer's stockholders and to receive the commissioner's approval of the acquisition before

ance holding company statutes before the NAIC Act was finalized. Schwing, *supra* note 12, at 96 n.1; Seiler, *supra* note 8, at 324-25.

14. The acquisition of control provisions are only one feature of typical insurance holding company legislation. See Seiler, *supra* note 8, at 341. Such legislation also allows organization and acquisition of, and regulates insurers' investments in and diversification through, subsidiaries, a practice known as "downstream diversification." See, e.g., MODEL ACT, *supra* note 11, § 2; D.C. CODE ANN. § 35-2002 (1981); IOWA CODE ANN. § 521A.2 (West Supp. 1984-1985); MONT. CODE ANN. § 33-2-1102 (1983); OKLA. STAT. ANN. tit. 36, § 1652 (West 1976). Authorizing legislation was necessary to permit downstream diversification because of statutory restrictions on insurers' ownership of stock of other corporations. See, e.g., ALA. CODE ANN. § 27-41-17 (1975); MASS. ANN. LAWS ch. 175, § 193D (Michie/Law. Co-op. 1977); TENN. CODE ANN. § 56-3-404 (1980).

Another feature of insurance holding company legislation is that it regulates and limits transactions between the insurer and other members of the holding company system. See MODEL ACT, *supra* note 11, § 5. To avoid threats to the security of policyholders, the state acts require careful monitoring of dividends and other distributions by an insurer to an affiliate in the holding company system and of other transactions between such affiliates and the insurer. See, e.g., ALASKA STAT. § 21.22.080 (1984); MINN. STAT. § 60D.04 (1984); N.H. REV. STAT. ANN. § 401-B:6 (1983); R.I. GEN. LAWS § 27-35-4 (1979).

15. The Model Act defines "control" as follows:

The term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten (10) percent or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by Section 4(i) that control does not exist in fact. The Commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support such determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.

MODEL ACT, *supra* note 11, § 1(c). For state definitions of "control" patterned after that in the Model Act, see, e.g., COLO. REV. STAT. ANN. § 10-3-801(3) (1973); IND. CODE ANN. § 27-1-23-1(c) (Burns 1983); MINN. STAT. § 60D.01(4) (1984); MO. ANN. STAT. § 382.010(2) (Vernon Supp. 1985).

making the offer or agreement.¹⁶ The disclosure statement must reveal the identity and background of the offeror, the source, nature, and amount of the consideration to be offered, audited financial statements, and the offeror's plans, if any, to liquidate, merge, or otherwise materially change the insurer.¹⁷ The commissioner is authorized to hold a public hearing in which any interested person can participate and to block the offer or agreement if the commissioner finds, *inter alia*, that the acquisition of control would be unfair or unreasonable to the insurer's stockholders or policyholders or adverse to the public interest.¹⁸

This Article explores the issue of whether, after the invalidation in *Edgar v. MITE Corp.*¹⁹ of similar provisions of the Illinois general business takeover statute and the promulgation of Rule 14d-2(b), the present state insurance takeover statutes can withstand a constitutional challenge. Part I examines the business takeover statute found unconstitutional in *Edgar* and explains how the promulgation of Rule 14d-2(b) resolved some of the constitutional questions left unanswered by that case. Part II discusses the effect that *Edgar* and Rule 14d-2(b) have on existing state insurance takeover statutes and concludes that these statutes are unconstitutional. Part III reviews the negative impact of this conclusion on policyholders. Finally, Part IV examines the importance of the policyholder protection features of the insurance statutes and proposes legislative amendments designed to avoid the unfortunate consequences of their invalidity.

I. STATE BUSINESS TAKEOVER LAWS AFTER *EDGAR* AND RULE 14d-2(b)

All but one of the thirty-seven state takeover statutes in ef-

16. See, e.g., MODEL ACT, *supra* note 11, § 3; GA. CODE ANN. § 33-13-3 (1982); MICH. COMP. LAWS §§ 500.1311-1316 (West 1983); MINN. STAT. § 60D.02 (1984); NEV. REV. STAT. § 692C.180 (1973).

17. The NAIC has promulgated model regulations to accompany the Model Act, including Form A, the disclosure statement required in connection with the acquisition of control of an insurer. See IIB 1970 N.A.I.C. PROC. 1055 (text of proposed regulations); I 1971 N.A.I.C. PROC. 149 (reporting adoption of regulations). For state provisions regarding required disclosure statements, see, e.g., KAN. STAT. ANN. § 40-3304(b) (1981); MINN. STAT. § 60D.02(2) (1984); N.M. STAT. ANN. § 59-7-6 (1978); S.C. CODE ANN. § 38-29-70 (Law. Co-op. 1976).

18. See, e.g., MODEL ACT, *supra* note 11, § 3(d); ARK. STAT. ANN. § 66-5005(d) (1980); IOWA CODE ANN. § 521A.3(4) (West Supp. 1984); MINN. STAT. § 60D.02(4) (1984); S.D. CODIFIED LAWS ANN. §§ 58-5A-9, -10 (1978).

19. 457 U.S. 624 (1982).

fect at the time of the Supreme Court's decision in *Edgar v. MITE Corp.* were enacted after the passage of the Williams Act in 1968.²⁰ Although there were individual variations, these statutes typically required the party making the tender offer to wait a period of time, often twenty days after the public announcement of the offer's material terms, before commencing the offer.²¹ The statutes usually demanded that the offeror comply with strict disclosure requirements²² and authorized the corporations commissioner, secretary of state, or similar state official to conduct a hearing to review the adequacy of the disclosures and, in many states, the merits and fairness of the tender offer.²³

In *Edgar*, the Supreme Court concluded that the Illinois Business Take-Over Act,²⁴ which was representative of such takeover statutes, was unconstitutional under the commerce clause. Only a plurality of the Court found that the state act directly regulated commerce and thus was per se unconstitutional under the commerce clause.²⁵ The majority, however, found that the state act was unconstitutional because it imposed a burden on interstate commerce that was excessive in relation to the local interests it served.²⁶

The Court determined that neither of the local interests purportedly advanced by the state takeover statute, protection of the target corporation's resident shareholders and regulation of the internal affairs of domestic corporations,²⁷ justified the burdens the statute imposed on interstate commerce. Although the Court recognized that protection of resident shareholders was a legitimate interest, this purpose did not justify the burden the statute placed on nonresident shareholders.²⁸ The

20. *Id.* at 631 n.6; Note, *State Regulation of Tender Offers*, 7 J. CORP. L. 603, 603 n.2 (1982).

21. See Note, *supra* note 20, at 606.

22. See *id.* at 607. These disclosure requirements frequently were broader and demanded more detail than did the Williams Act. *Id.* at 609; see *infra* notes 32-39 and accompanying text.

23. See Note, *supra* note 20, at 609.

24. ILL. REV. STAT. ch. 121 1/2, §§ 137.51-.70 (1979) (repealed 1983).

25. 457 U.S. at 641-43. Direct regulation of interstate commerce by a state is itself a violation of the commerce clause. In contrast, indirect regulation of interstate commerce is impermissible only when the burden imposed on interstate commerce exceeds the local benefits achieved by such regulation. *Dowling, Interstate Commerce and State Power*, 27 VA. L. REV. 1, 6 (1940).

26. See 457 U.S. at 643-46 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

27. *Id.* at 644.

28. *Id.*

Court noted that the protection of resident shareholders was incomplete because the statute exempted a corporation's acquisition of its own shares.²⁹ Moreover, the Court doubted whether the statute substantially enhanced the protection of Illinois shareholders since federal law contained many of the statute's substantive protections.³⁰ The Court also remained unpersuaded by the asserted rationale that the state act was a legitimate exercise of the state's power to regulate the internal affairs of domestic corporations. Once again, the statute's reach exceeded its purpose by applying not only when the target was a domestic corporation, but also when Illinois residents held ten percent of a foreign target's outstanding shares. Further, the Court concluded that shareholder transfers of stock to tender offerors simply did not implicate the target's internal affairs.³¹

In addition, a plurality of the Court³² found that the Illinois statute was preempted under the supremacy clause by the Williams Act,³³ a 1968 amendment to the Securities Exchange Act of 1934 designed to regulate cash tender offers for securities of certain corporations.³⁴ The Williams Act requires a tender offeror to distribute a detailed disclosure statement,³⁵ gives each target shareholder a defined period in which to withdraw the tendered shares,³⁶ mandates that the offeror accept shares tendered within ten days of the offer on a pro rata basis,³⁷ stipulates that any increase in the consideration offered during the tender offer be paid to shareholders tendering before the increase,³⁸ and prohibits fraud in the conduct of the

29. *Id.*

30. *Id.* at 644-45.

31. *Id.* at 645.

32. *Id.* at 630-40.

33. Pub. L. No. 90-439, 82 Stat. 454 (1968) (amending Exchange Act §§ 12-14, codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982)).

34. *See* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 22 (1977).

35. Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1982); *see* Rule 14d-3, 17 C.F.R. § 240.14d-3 (1984).

36. Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1982). Under the rules, a shareholder may withdraw tendered shares until 15 days after commencement of the offer and, if the shares have not yet been purchased, within 60 days of the offer or 10 days after commencement of a competing offer. Rule 14d-7, 17 C.F.R. § 240.14d-7 (1984).

37. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1982). The rules have extended this privilege to all shares tendered during the offer. Rule 14d-8, 17 C.F.R. § 240.14d-8 (1984).

38. Exchange Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1982).

tender offer.³⁹

The Illinois statute, like most first generation state business takeover laws,⁴⁰ imposed more restrictive requirements on the conduct of tender offers than did the Williams Act. The statute required the offeror to notify the Secretary of State and the target company of its intent to make an offer and of the offer's material terms at least twenty days before commencing the offer.⁴¹ During those twenty days, the statute forbade the offeror from communicating with the target's shareholders.⁴² Further, it allowed any Illinois shareholders controlling ten percent of the target corporation's outstanding stock to demand a hearing before the Illinois Secretary of State⁴³ and empowered the Secretary to forbid the tender offer if the offer lacked substantial fairness.⁴⁴

Although the *Edgar* plurality noted that there was no contention that an offeror could not comply with both the Illinois statute and the Williams Act,⁴⁵ it concluded, as have a number of lower courts,⁴⁶ that the state statute unconstitutionally hin-

39. *Id.* § 14(e), 15 U.S.C. § 78n(e).

40. See *supra* notes 3 & 20-23 and accompanying text.

41. ILL. REV. STAT. ch. 121 1/2, §§ 137.54.B, .E (1979) (repealed 1983).

42. *Id.* § 137.54.A.

43. See *id.* § 137.57.A.

44. *Id.* § 137.57.E.

45. 457 U.S. at 631-32. Because the events giving rise to the *Edgar* litigation occurred before the effective date of Rule 14d-2(b), the conflict between that rule and many state takeover statutes was not at issue. *Id.* at 636 n.11; see *infra* notes 51-55 and accompanying text.

46. See, e.g., *Telvest v. Bradshaw*, 697 F.2d 576, 580-81 (4th Cir. 1983); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128-33 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 184-85 (3d Cir. 1980); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1274-81 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979); *Bendix Corp. v. Martin-Marietta Corp.*, 547 F. Supp. 522, 525-29 (D. Md. 1982); *Empire, Inc. v. Ashcroft*, 524 F. Supp. 898, 903-04 (W.D. Mo. 1981); *Natomas Co. v. Bryan*, 512 F. Supp. 191, 192-93 (D. Nev. 1981); *Crane Co. v. Lam*, 509 F. Supp. 782, 785-88 (E.D. Pa. 1981); *Hi-Shear Indus., Inc. v. Campbell*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,030-32 (D.S.C. Dec. 4, 1980); *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1, 12-13 (S.D. Ind. 1978); *Esmark v. Strode*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,245-47 (Ky. Oct. 12, 1982); *Kelly v. Beta-X Corp.*, 103 Mich. App. 51, 57-59, 302 N.W.2d 596, 598-99 (1981). For cases rejecting preemption challenges to state takeover statutes, see, e.g., *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 933-38 (S.D. Ohio 1979); *City Investing Co. v. Simcox*, 476 F. Supp. 112, 115-16 (S.D. Ind. 1979); *Wylain, Inc. v. TRE Corp.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,270, at 96,928-31 (Del. Ch. Jan. 31, 1980); *Sharon Steel Corp. v. Whaland*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,303, at 91,900-02 (N.H. July 2, 1981). Some courts went even further than did the *Edgar* plurality to find impermissible conflicts between the Williams Act and

dered the execution and accomplishment of the objectives of the Williams Act. The plurality reasoned that in enacting the Williams Act Congress carefully balanced the interests of the offeror and of the target's management in order to effectuate the goal of investor protection.⁴⁷ The Act permits both sides to explain their position to the shareholders but prevents them from exercising any undue advantage that could improperly influence the shareholders' ultimate decision. Under the plurality's analysis, the provisions of the state takeover statute upset this federally imposed neutrality. By requiring the offeror to wait twenty days before contacting the target's shareholders, the target's management was given a significant period of time in which to persuade shareholders to reject the proposed offer.⁴⁸ Furthermore, the state statute's hearing provision imposed no deadline for completion or decision and thus gave a management coalition holding ten percent of the target's outstanding stock the invaluable weapon of delay.⁴⁹ Finally, permitting the Secretary of State to pass on the tender offer's merits conflicted with the Act's "market approach," which allowed shareholders to make their own decisions following disclosure.⁵⁰

Although *Edgar*'s resolution of the preemption issue is of limited precedential value because it was only a plurality decision, most questions remaining after *Edgar* should have been eliminated by the SEC's promulgation of Rule 14d-2(b) in late 1979.⁵¹ Rule 14d-2(b) requires the offeror to commence or with-

state provisions regarding the periods during which pro rata and withdrawal rights attach, see *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1221-22 (D.N.J. 1981); *Dart Indus. v. Conrad*, 462 F. Supp. 1, 12-13 (S.D. Ind. 1978), and the disclosure requirements with which tender offerors must comply, see *Dart Indus. v. Conrad*, 462 F. Supp. 1, 10-11 (S.D. Ind. 1978).

47. 457 U.S. at 632-34.

48. *Id.* at 634-36.

49. *Id.* at 636-39.

50. *Id.* at 639-40.

51. See *supra* note 45. In the release announcing the adoption of the new tender offer rules, the SEC explained the intended purpose of Rule 14d-2(b):

As discussed more fully in the February release, Rule 14d-2(b) is intended to prevent public announcements by a bidder of the material terms of its tender offer in advance of the offer's formal commencement. The Commission believes that this practice is detrimental to the interests of investors and results in many of the abuses the Williams Act was enacted to prevent. Such pre-commencement public announcements cause security holders to make investment decisions with respect to a tender offer on the basis of incomplete information and trigger market activity normally attendant to a tender offer, such as arbitrageur activity. Since they constitute the practical commence-

draw the tender offer within five days of the public announcement of its material terms.⁵² This requirement directly conflicts with state provisions imposing a longer precommencement waiting period following the offer's announcement.⁵³ The Rule also conflicts with state takeover provisions requiring a hearing and the approval by a state official before the commencement of the offer.⁵⁴ The official's hearing and decision invariably will come long after the expiration of the Rule 14d-2(b) five-day deadline. Consequently, Rule 14d-2(b) renders compliance with these provisions of the state business takeover statutes impossible and therefore requires preemption of the state statutes under the supremacy clause,⁵⁵ whatever their status under the commerce clause.

ment of a tender offer, such pre-commencement public announcements cause the contest for control of the subject company to occur prior to the application of the Williams Act and therefore deny security holders the protections which that Act was intended by Congress to provide.

Exchange Act Release No. 16,384, 44 Fed. Reg. 70,326, 70,329 (Nov. 29, 1979), *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,582-83 [hereinafter cited as Release No. 34-16,384]; *see also* Exchange Act Release No. 15,548, 44 Fed. Reg. 9956, 9969-70 (Feb. 5, 1979), *reprinted in* [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,935, at 81,227-28 (discussing proposed Rule 14d-6, later renumbered as Rule 14d-2) [hereinafter cited as Release No. 34-15,548].

52. Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1984).

53. *See* National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1130 (8th Cir. 1982); Joseph E. Seagram & Sons, Inc. v. Marly, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,246, at 91,618-19 (W.D. Okla. July 17, 1981); Crane Co. v. Lam, 509 F. Supp. 782, 786 (W.D. Pa. 1981); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1222 (D.N.J. 1981); Canadian Pac. Enters., Inc. v. Krouse, 506 F. Supp. 1192, 1196-97 (S.D. Ohio 1981).

54. *See* National City Lines, Inc. v. LLC Corp., 687 F.2d 1122, 1130 (8th Cir. 1982); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1222 (D.N.J. 1981); Release No. 34-16,384, *supra* note 51, at 70,329-30, *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,583-84. The offeror might avoid that conflict by conditioning the offer upon completion of the hearing and approval by the state regulator. *See infra* notes 141-50 and accompanying text.

55. The argument also has been made that the detailed rules promulgated by the Commission, when viewed together with the Williams Act, constitute a pervasive regulatory scheme that implicitly preempts all state regulation of the same transactions. *See* Note, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes*, 8 FORDHAM URB. L. REV. 913, 930-31 (1980).

II. THE CONSTITUTIONALITY OF STATE INSURANCE TAKEOVER STATUTES AFTER *EDGAR* AND RULE 14d-2(b)

The acquisition of control provisions of most state insurance statutes are materially similar to the provisions of the state business takeover laws invalidated by *Edgar* and Rule 14d-2(b).⁵⁶ Despite this similarity, one commentator has strained to argue for upholding the validity of these statutes.⁵⁷ The insurance takeover statutes, however, may be unconstitutional under the commerce clause for unduly regulating interstate commerce. Moreover, these statutes, like the state business takeover laws, encroach on an area governed by the Williams Act and Rule 14d-2(b) and are thereby preempted.

A. INTERSTATE COMMERCE

In the 1869 decision of *Paul v. Virginia*,⁵⁸ the Supreme Court held that insurance was not "commerce" within the meaning of the commerce clause. For the next three-quarters of a century, states regulated and taxed the insurance industry free from commerce clause restraints.⁵⁹ In 1944, however, the Court reversed the *Paul* decision, finding that insurance did indeed constitute "commerce" under the commerce clause.⁶⁰ In response to this reversal, Congress passed the McCarran-Ferguson Act,⁶¹ restoring the states' regulatory and taxing powers to

56. Compare *supra* notes 14-18 and accompanying text (describing insurance takeover statutes) with *supra* notes 20-23 and accompanying text (describing business takeover statutes). Before *Edgar*, the constitutionality of the insurance provisions was litigated with mixed results. Such provisions were found valid in two decisions, see *John Alden Life Ins. Co. v. Woods*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,617 (D. Idaho Dec. 19, 1981); *Sun Life Group, Inc. v. Standard Life Ins. Co.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314 (S.D. Ind. Mar. 12, 1980), and invalid in two others, see *Gunter v. Ago Int'l B.V.*, 533 F. Supp. 86 (N.D. Fla. 1981); *National City Lines, Inc. v. LLC Corp.*, 524 F. Supp. 906 (W.D. Mo. 1981), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982).

57. See Note, *State Regulation of Tender Offers for Insurance Companies After Edgar v. MITE*, 51 *FORDHAM L. REV.* 943 (1983) [hereinafter cited as *Fordham Note*]. But see Note, *supra* note 12 (arguing that insurance takeover statutes are unconstitutional). There have been no reported decisions on this question since *Edgar*.

58. 75 U.S. (8 Wall.) 168 (1869).

59. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 414 (1946).

60. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

61. Pub. L. No. 15, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-1015 (1982)). The Act as codified provides in pertinent part:

§ 1011. Declaration of Policy

their pre-1944 status.⁶²

The McCarran-Ferguson Act embodies Congress's belief that insurance is a "local matter to be subject to and regulated by the several states."⁶³ The Act removes all commerce clause limitations on the states' power to regulate the "business of insurance."⁶⁴ It further provides that state laws regulating the "business of insurance" are preempted by a federal statute only when the statute is expressly applicable to such business.⁶⁵ The McCarran-Ferguson Act consequently is a "reverse supremacy clause,"⁶⁶ under which state insurance laws can "preempt" federal statutes of general applicability.⁶⁷

The seminal case on the relationship between state insurance laws and federal securities law is *SEC v. National Securities, Inc.*⁶⁸ In *National Securities*, the SEC alleged that two insurers accomplished a merger through fraudulent, material misrepresentations in violation of Rule 10b-5.⁶⁹ The defendants asserted that the Arizona Director of Insurance had approved

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

§ 1012.

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, . . . unless such act specifically relates to the business of insurance: *Provided*, That . . . the Sherman Act and . . . the Clayton Act, and . . . the Federal Trade Commission Act, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

62. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 412-13 (1954).

63. H.R. REP. NO. 143, 79th Cong., 1st Sess. 2, reprinted in 1945 U.S. CODE CONG. & AD. NEWS 670, 670-71.

64. 15 U.S.C. § 1012(a) (1982); see *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-55 (1981); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-31 (1946).

65. 15 U.S.C. §§ 1011, 1012(b) (1982).

66. Lent, *McCarran-Ferguson in Perspective*, 48 INS. COUNS. J. 411, 425 (1981).

67. Belkin, *State Regulation: Anachronism or Advantage*, 29 FED. INS. COUNS. Q. 209, 214 (1979); Note, *Applications of Federal Antitrust Laws to the Insurance Industry*, 46 MINN. L. REV. 1088, 1093 (1962).

68. 393 U.S. 453 (1969).

69. 17 C.F.R. § 240.10b-5 (1968).

the merger under the state's insurance law⁷⁰ and that application of federal securities law would violate the McCarran-Ferguson Act by superceding Arizona's insurance laws.⁷¹

In its analysis of the defendants' claim, the Supreme Court in *National Securities* defined the "business of insurance" shield of McCarran-Ferguson to include those state statutes that regulate, directly or indirectly, the relationship between insurers and their policyholders, including regulations promoting insurer reliability.⁷² Thus, those provisions of the Arizona merger statute that authorized the state Director of Insurance

70. ARIZ. REV. STAT. ANN. § 20-731 (Supp. 1969) (amended 1974). The Arizona merger law under which the Director acted was enacted prior to the insurance holding company acts in response to the 1964 amendments to the Securities Exchange Act. 393 U.S. at 457 n.2; see *infra* note 195 and accompanying text.

71. 393 U.S. at 457.

72. The Court explained:

The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation and enforcement—these are the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance."

Id. at 460.

Although this definition includes both a core and an outer layer of the business of insurance, later Supreme Court decisions appear to limit the definition to its core. See, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127-29 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210-18 (1979). These decisions, however, concerned federal antitrust challenges to insurance industry practices and should not be applied outside that context. The antitrust exemption to the McCarran-Ferguson Act was motivated not by the broad "federalist" purpose generally underlying the Act, but rather by the limited judgment that price competition would cause insurer insolvencies and thus harm policyholders. Therefore, a different and narrower interpretation of the "business of insurance" is justified in the antitrust context. See Jacks, *The Impact of Increased State Regulation of Insurance Mergers and Acquisitions on Federal Antimerger Regulations*, 27 *DRAKE L. REV.* 638, 642-44 (1977-1978); Note, *The Definition of "Business of Insurance" Under the McCarran-Ferguson Act After Royal Drug*, 80 *COLUM. L. REV.* 1475, 1480-84 (1980). Furthermore, the decisions applying a narrow definition of the "business of insurance" did not implicate insurer reliability. *Royal Drug* involved agreements between Blue Shield and pharmacists limiting the cost of medication, 440 U.S. at 207, and *Union Labor Life* involved the evaluation by a professional peer review committee of the necessity of chiropractic treatments and the reasonableness of the fees charged for them, 458 U.S. at 123. The cases thus are factually distinguishable and should not control in areas, such as the regulation of insurance takeovers, in which reliability of the insurer truly may hang in the balance.

to block mergers that could substantially reduce the security of and service to policyholders regulated the "business of insurance" because those provisions sought to protect the insurers' *policyholders*.⁷³ In contrast, those provisions protecting the insurers' *stockholders* fell outside McCarran-Ferguson's "business of insurance" immunity.⁷⁴

The broad definition in *National Securities* of state laws regulating the "business of insurance" includes state laws regulating acquisition of control of domestic insurers. The overriding purpose of insurance takeover statutes is the protection of the insurer's policyholders.⁷⁵ Aware that insurers with highly liquid assets are likely to become takeover targets of holding companies in need of cash to finance unrelated activities,⁷⁶ the

73. 393 U.S. at 460. The Court concluded, however, that McCarran-Ferguson would not bar the SEC action because the state law would not be invalidated, impaired, or superseded by the merger's reversal for fraud or misrepresentation in securing shareholder approval. See *id.* at 462-63.

74. *Id.* at 460-61. *National Securities* has long been misinterpreted. A vast majority of courts and commentators construe it to hold that state regulation of insurance company mergers is not regulation of the "business of insurance" within the McCarran-Ferguson Act. See, e.g., *Commander Leasing Co. v. Transamerica Title Ins. Co.*, 477 F.2d 77, 85 (10th Cir. 1973); *American General Ins. Co. v. FTC*, 359 F. Supp. 887, 896-97 (S.D. Tex. 1973), *aff'd on other grounds*, 496 F.2d 197 (5th Cir. 1974); Belkin, *supra* note 67, at 212; Kanwit, *The Federal Trade Commission and Insurance Mergers*, 1980 INS. L.J. 73, 75; Lent, *supra* note 66, at 414; Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 TEMPLE L.Q. 51, 53 (1979); Smith, *McCarran-Ferguson: A Perspective of Current Trends and Issues*, 14 FORUM 1032, 1037 (1979). This interpretation focuses only on the first part of the *National Securities* definition of the "business of insurance": the relationship of the insurer and insured and the type, reliability, and interpretation of the policy issued to the insured. See *supra* note 72. It ignores, however, the perimeter of the definition. See *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 574 (E.D. Pa. 1974). In so doing, it fails to recognize that insurance company mergers may have a profound effect on a company's status as a reliable insurer and, therefore, that state regulation of such mergers may be at least an indirect protection of the relationship between insured and insurer. See *National Securities*, 393 U.S. at 461-62. Perhaps more importantly, the conclusion that mergers are invariably outside the business of insurance completely ignores the holding in *National Securities* that a state statute that regulates insurance mergers with a view to policyholder protection "clearly relates to the business of insurance." *Id.* at 462. This language unquestionably undermines the notion that mergers are by definition excluded from the "business of insurance."

75. See INDUSTRY ADVISORY COMMITTEE REPORT, *supra* note 9, at 178.

76. See 19 J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 10,433, at 325 (rev. ed. 1982) [hereinafter cited as J. APPLEMAN]; Kemper, *supra* note 9, at 324-25; Kennedy, *State Insurance Commissioner Involvement in Takeovers of Insurers: An Overview of Procedures and Some Constitutional Considerations*, 17 FORUM 374, 375-76 (1981); Seiler, *supra* note 8, at 325;

Model Act's drafters sought to protect the insurer's solvency and the policyholders' security.⁷⁷ This goal was implemented through the two-pronged approach of regulating both acquisitions of control of insurers⁷⁸ and transactions between the insurer and its affiliates in the holding company system.⁷⁹ By requiring broad and detailed disclosures⁸⁰ and conditioning the commissioner's approval of the acquisition on the finding that it would not be unfair and unreasonable to policyholders,⁸¹ the drafters demanded that the offeror demonstrate that its acqui-

Shaffer, *Revised Memorandum on Issues and Problems Surrounding the NAIC Model Insurance Holding Company Act*, II 1982 N.A.I.C. PROC. 45, 49; Note, *The Insurance Holding Company Phenomenon and the Search for Regulatory Controls*, 56 VA. L. REV. 636, 641-42 (1970).

77. After listing several benefits of using the holding company arrangement, the Industry Advisory Committee stated:

Thus, there are unquestionable and legitimate advantages that can accrue for many insurers in these circumstances. These advantages redound to the benefit of policyowners as insurers are able to increase underwriting capacity through easier access to capital and to provide a broader spectrum of services. Nonetheless, there should be effective state supervision of insurers in their relationship with holding companies. Such supervision is a proper and natural extension of the responsibility of state regulatory authority to assure, in the public interest, the solvency of the insurer and the protection and fair treatment of policyholders. Insurance is a business that is dependent completely on public confidence. Its contracts underwrite contingencies that may be long deferred or promise payments to be made many years in the future. Patronage of insurers is dependent upon the confidence of the buyer that the insurer can and will discharge its obligations in the manner provided in its contract. Because of the intangible nature of the insurance promise and its enormous significance to the social and economic structure as well as to the parties of the contract, the insurance business over many decades has developed and maintained a philosophy and ethics and practices on a level far above those that are generally accepted in the marketplace. Sound regulation of the insurance business by the states has reinforced this unique status of insurers and such regulation has been a principal bulwark of the public confidence that the business enjoys.

INDUSTRY ADVISORY COMMITTEE REPORT, *supra* note 9, at 178 (footnote omitted). The Committee also noted: "The thrust of insurance department regulation should be directed primarily to the maintenance of solvency of the insurer, to the protection and fair treatment of policyholders and to the prevention of activity that might adversely affect competition within the insurance business." *Id.* at 181-82.

78. MODEL ACT, *supra* note 11, § 3.

79. *Id.* § 5. Section 5 requires that all material transactions between the insurer and affiliates in the holding company system be fair and reasonable, be properly recorded on the insurer's books and records, and leave the insurer with adequate surplus. It also requires that all extraordinary dividends or distributions by insurers in holding company systems be submitted in advance to the insurance commissioner for consideration.

80. MODEL ACT, *supra* note 11, § 3(a)-(e).

81. *Id.* § 3(d)(v).

sition of control would not endanger the insurer's policyholders.

Admittedly, policyholder protection is not the only goal of the insurance takeover statutes; they also contain provisions protecting the target insurer's shareholders.⁸² The inclusion of these provisions, however, is a product of the age in which they were adopted. When the Model Act was passed, few general business takeover laws existed to protect shareholder interests.⁸³ The Act's drafters, therefore, probably included shareholder protections only to compensate for this regulatory neglect.⁸⁴ In both the Model Act and the statutes patterned after it, the controlling objective clearly is policyholder rather than shareholder protection.

The clearest indication that shareholder protection is not the dominant concern of the insurance takeover statutes is their limited applicability. The Model Act, for example, applies only to those offers for, or attempts to acquire voting securities of, a domestic insurer that could place the acquiring party in control.⁸⁵ This limitation would not be present if the Act was

82. The Model Act provides, for example, that the offeror's disclosure statement be sent to shareholders of the target insurer, *see id.* § 3(a), that securityholders of the insurer receive notice of the public hearing, *id.* § 3(d)(2), and that the commissioner approve the offer only if it is not prejudicial, unfair, or unreasonable to securityholders, *id.* § 3(d)(1)(iii), (iv). Other provisions of the Model Act that do not refer specifically to securityholders nevertheless are clearly designed to protect their interests. Included in this category are the provisions requiring disclosure of any recommendations to purchase the target stock made by the offeror within the 12 months before the offer, *id.* § 3(b)(9), and of any agreement between the offeror and a broker-dealer concerning the solicitation of the target's stock, *id.* § 3(b)(11). *See Kennedy, supra* note 76, at 385 (observing that, despite these examples of shareholder protection, "the greater part of the NAIC Model Act seems clearly designed to protect the interests of policyholders").

A proposal has been made to the NAIC to eliminate the provisions dealing with shareholder protection in order to avoid conflict with federal and other state laws. REPORT OF THE INSURANCE HOLDING COMPANIES (A2) SUBCOMMITTEE, *reprinted in* I 1981 N.A.I.C. PROC. 191. It suggests deletion of all the specific references to securityholders but retains other provisions, such as §§ 3(b)(9) and (11), that, although clearly designed to protect securityholders, do not expressly mention them. *See id.* at 194-203 (proposed working draft of amendment).

83. *See Note, supra* note 20, at 603 n.2.

84. Although the Williams Act was enacted in 1968, one year before the Model Act's adoption, it did not cover tender offers for equity securities of insurance companies until the 1970 amendments. *See Act of Dec. 22, 1970, Pub. L. No. 91-567, sec. 3, Exchange Act § 14(d)(1), 84 Stat. 1497, 1497 (codified at 15 U.S.C. § 78n(d)(1) (1982)).*

85. *See MODEL ACT, supra* note 11, § 3. State holding company acts generally are similar to the Model Act in this respect. *See, e.g., IDAHO CODE § 41-*

concerned primarily with protecting a target insurer's shareholders. Even in situations in which the offer cannot result in a transfer of control, tendering and nontendering shareholders require the protections inherent in disclosure and antifraud provisions to make an informed decision. Policyholders, however, need such protections only when the offer might result in a transfer of control, since with control comes the power to divert the insurer's assets and thereby threaten the policyholders' security.

The absence in the insurance takeover statutes of provisions relating to the conduct of the tender offer further confirms that they primarily are directed at securing policyholder and not shareholder interests. The Model Act, unlike the Williams Act, does not include such common shareholder protections as permitting withdrawal by offerees,⁸⁶ requiring pro rata purchases in the event that the offer is oversubscribed,⁸⁷ and establishing minimum hold-open periods.⁸⁸ Such protections against unfairly conducted offers, however, would be helpful only to shareholders, who otherwise might be coerced into a premature tender decision. Since policyholders face no similar threat, the general lack of such provisions in insurance takeover statutes emphasizes their concern for protecting policyholders.⁸⁹

National Securities, therefore, stands for the proposition that state insurance statutes enacted to protect policyholders from the adverse consequences of certain business combinations relate to the "business of insurance." Although *National*

3802 (Supp. 1984); IND. CODE ANN. § 27-1-23-2 (Burns Supp. 1984); UTAH CODE ANN. § 31-39-2 (1983); VT. STAT. ANN. tit. 8, § 3683 (1984). Pennsylvania is the only exception, requiring advance regulatory approval not only for acquisitions that result in a change of control but also for additional acquisitions by a 10% beneficial owner. See PA. STAT. ANN. tit. 40, § 459.6(b) (1971 & Supp. 1984-1985).

86. See Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1982); Rule 14d-7, 17 C.F.R. § 240.14d-7 (1984).

87. See Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1982); Rule 14d-8, 17 C.F.R. § 240.14d-8 (1984).

88. See Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (1984).

89. The unfairness of the offer to the target's shareholders is occasionally cited as one of the reasons for administrative rejection of the acquisition. The Connecticut Insurance Commissioner, for example, initially rejected the ITT-Hartford merger in part because the merger favored the offeror's shareholders over those of the target. The Commissioner's primary reason for disapproval, however, was the possibility that the offeror would deplete the insurer's surplus to finance other acquisitions. Note, *supra* note 76, at 658-60. Usually insurance regulators treat the issue of fairness to shareholders as ancillary to the issue of fairness to policyholders. Dew, *supra* note 12, at 106.

Securities involved a merger, there is no reason to restrict this definition to mergers and exclude other forms of combinations and acquisitions such as tender offers.⁹⁰ As a result, the state insurance takeover statutes fall within the *National Securities* definition of "business of insurance" because of their emphasis on policyholder protection,⁹¹ and the McCarran-Ferguson Act therefore should remove all commerce clause barriers to their constitutionality.⁹² If the McCarran-Ferguson Act is deemed inapplicable to these statutes, however, the similarity of the state insurance takeover statutes to the general business takeover statute invalidated in *Edgar* suggests that they may encounter serious, though not necessarily insurmountable, commerce clause challenges.

As noted earlier,⁹³ a plurality in *Edgar* found a state business takeover statute per se unconstitutional because it directly regulated interstate commerce.⁹⁴ State insurance takeover statutes also would constitute direct regulation of interstate commerce under the plurality's analysis. Since both the general business and insurance takeover statutes have essentially the same scheme of regulation, including precommencement disclosure, public hearing, and advance approval by an appropriate state official, they are alike in their method of regulating interstate commerce. That the insurance takeover statutes have a different purpose from that of their general business takeover

90. See Note, *supra* note 12, at 291-93. From the policyholders' standpoint, it is virtually irrelevant whether transfer of control of their insurer is accomplished by merger, proxy contest, tender offer, or some other acquisition technique. In each of these situations, the crucial questions for the policyholders are whether the insurer will continue to be reliable and whether the security provided by their policies will be jeopardized by the acquisition.

91. See *supra* note 72 and accompanying text.

92. See *Professional Investors Life Ins. Co. v. Roussell*, 528 F. Supp. 391, 402 (D. Kan. 1981); *John Alden Life Ins. Co. v. Woods*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,617, at 93,066 (D. Idaho Dec. 19, 1981). But see *National City Lines, Inc. v. LLC Corp.*, 524 F. Supp. 906, 911-12 (W.D. Mo. 1981) (although certain portions of the Missouri Insurance Holding Company Act are protected by McCarran-Ferguson, those regulating tender offers are not), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982); *Sun Life Group, Inc. v. Standard Life Ins. Co.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314, at 97,118 (S.D. Ind. Mar. 12, 1980) (insurance tender offers not within the "business of insurance" subject to exclusive state regulation).

93. See *supra* note 25 and accompanying text.

94. See 457 U.S. 624, 643 (1982); see also *Bendix Corp. v. Martin-Marietta Corp.*, 547 F. Supp. 522, 532 (D. Md. 1982) (Maryland Corporate Takeover Law found unconstitutional because it violates the supremacy and commerce clauses).

counterparts is irrelevant in this context.⁹⁵ Consequently, under the plurality's analysis, the insurance takeover statutes probably would suffer the same fate as did the business takeover statute invalidated in *Edgar*.

Even if the plurality approach is disregarded and the insurance takeover statutes are found not to constitute a direct regulation of commerce, the burden these statutes impose on interstate commerce is comparable to that the *Edgar* majority held required invalidation of the Illinois business takeover statute.⁹⁶ Insurance statutes are inherently extraterritorial, with one state effectively legislating for the entire nation.⁹⁷ Enforcement of such a statute can bar⁹⁸ or delay⁹⁹ a national multimillion dollar transaction, thereby creating a substantial burden on interstate commerce. An even more severe burden can result from the application of several conflicting or inconsistent insurance and general business takeover statutes to the same transaction. Such a scenario could occur when states in which a target insurer transacts business apply their general business takeover laws to tender offers for foreign corporations with sufficient contacts with the state,¹⁰⁰ when a target insurance hold-

95. See *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199-200 (1925) (statutory purpose of state grain grading regulation does not excuse its direct burden on interstate commerce).

96. See *supra* notes 24-31 and accompanying text. Because the insurance statutes presumably will apply to fewer transactions, they could be viewed as imposing less severe burdens on interstate commerce than do the general business takeover acts. See *Professional Investors Life Ins. Co. v. Roussell*, 528 F. Supp. 391, 402 (D. Kan. 1981). Nevertheless, the effect of the insurance statutes on tender offers to which they apply is almost identical to that of the general takeover statutes. In that sense, the burden of each on interstate commerce is virtually indistinguishable.

97. See *Tiger, The Pennsylvania Takeover Disclosure Law: A Statute Waiting to be Invalidated*, 25 VILL. L. REV. 458, 470 (1980); *Wilner & Landy, The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 FORDHAM L. REV. 1, 8-9 (1976).

98. See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1284 (5th Cir. 1978); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1224 (D.N.J. 1981); *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1, 14 (S.D. Ind. 1978).

99. See, e.g., *Crane Co. v. Lam*, 509 F. Supp. 782, 790 (E.D. Pa. 1981); *Hi-Shear Indus., Inc. v. Campbell*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,033 (D.S.C. Dec. 4, 1980). See generally *Oldham, Regulating the Regulators: Limitations upon a State's Ability to Regulate Corporations with Multistate Contacts*, 5 DEL. J. CORP. L. 181, 210-15 (1980) (discussing delays and other burdens imposed on interstate commerce by state takeover laws).

100. *Fordham Note, supra* note 57, at 951 & n.55. In this situation, the takeover could be subject to the insurance holding company act and the general business takeover statute of the insurer's domicile and to the laws of other states with which the insurer has the requisite contacts. For this to oc-

ing company has subsidiary insurers incorporated in different states,¹⁰¹ or when a state insurance takeover statute applies to a "commercially domiciled insurer" incorporated elsewhere.¹⁰² An insurance holding company might even attempt to thwart potential bidders by intentionally organizing subsidiaries in various states or by acquiring insurers incorporated in different states, thereby triggering multiple state insurance takeover laws.¹⁰³

The Model Act's drafters indicated in an alternative provision their recognition of the dangers of multiple regulation: "It is further declared that it is desirable to prevent unnecessary multiple and conflicting regulation of insurers. Therefore, this State shall exercise regulatory authority over domestic insurers and, unless otherwise provided in this article, not over non-domestic insurers, with respect to the matters contained herein."¹⁰⁴ This declaration, however, does not avoid the possibility of control by multiple states of a tender offer for the securities of an insurer. The Model Act's acquisition of control

cur, of course, the applicable general business takeover statutes could not exempt insurance acquisitions from their coverage.

101. See Silberman, Kezsbom & Sacks, *Disputed Tender Offers in Regulated Industries*, 8 J. CORP. L. 461, 466-69 (1983) (describing tender offer in which the target insurance holding company had insurance subsidiaries incorporated in Iowa, Alabama, California, Florida, Michigan, and Oklahoma).

102. California, for example, applies its insurance holding company act to insurers incorporated in the state and to "commercially domiciled insurers," defined as foreign insurers that, over the past three years, have written more gross premiums in California than in their state of domicile, as long as such California premiums constitute at least 20% of their gross premiums nationwide. See CAL. INS. CODE § 1215.13(a) (West Supp. 1985). Pennsylvania's act applies to acquisitions of the stock of insurance companies or of insurance holding companies that would make the purchaser a beneficial owner of 10% of the outstanding stock, even if neither the holding company nor any of its insurance subsidiaries are incorporated in Pennsylvania, if the tender offer is extended to shareholders residing in the state. See PA. STAT. ANN. tit. 40, § 459.6(b)(3) (Purdon Supp. 1984-1985); see also TEX. INS. CODE ANN. art. 21.49-1, § 18 (Vernon 1981) (applying Texas insurance law to Texas-licensed foreign insurers domiciled in states not having insurance controls substantially similar to those of Texas).

103. See Levi, *The Contested Acquisition of an Insurance Company from the Target's Point of View*, 17 FORUM 212, 218-19 (1981); Vinyard, *Federal Courts May Preempt State Takeover Laws*, 85 NAT'L UNDERWRITER (LIFE & HEALTH INS. ED.) 18, 22 (Dec. 5, 1981).

104. MODEL ACT, *supra* note 11, app. § 1(d); see also KAN. STAT. ANN. § 40-3301(d) (1981) (adopting Model Act position regarding multiple regulation). Texas adopted a similar provision but also provided that its holding company act applied to any licensed foreign insurer if its state of domicile does not provide substantially similar regulation. See TEX. INS. CODE ANN. art. 21.49-1, §§ 1(d), 18 (Vernon 1981).

section defines "domestic insurer" to include any person who controls "a domestic insurer unless such other person is either directly or through its affiliates primarily engaged in business other than the business of insurance."¹⁰⁵ Under this definition, a party seeking to acquire control of an insurance holding company primarily engaged in the insurance business will face regulation in every state in which a subsidiary insurer is organized.¹⁰⁶

105. MODEL ACT, *supra* note 11, § 3(a)(1). For similar state provisions, see IOWA CODE ANN. § 521A.3(1) (West Supp. 1984-1985); MO. ANN. STAT. § 382.040 (Vernon Supp. 1985); TEX. INS. CODE ANN. art. 21.49-1, § 5(a)(2) (Vernon 1981).

In its 1980 amendments, the NAIC extended the scope of the Model Act to acquisitions of nondomestic insurers that are authorized to do business in the state. The amendments provide that if such an acquisition substantially lessens competition in any line of insurance in the state, the commissioner is empowered, after a hearing, to order the acquiring and/or acquired insurer to cease and desist from doing business in the state or to deny either or both a license to transact business in the state. NAIC MODEL ACQUISITION AND MERGER LAW, *reprinted in* II 1980 N.A.I.C. PROC. 42.

The NAIC asserts that the amendments do not promote multiple state regulation of insurance acquisitions because the commissioner is not empowered to prohibit the acquisition of foreign insurers, but only authorized to deny the right to transact business in the state. NAIC MODEL ACQUISITION AND MERGER LAW BACKGROUND STATEMENT BY TASK FORCE TO REVIEW THE MODEL ACQUISITION AND MERGER REGULATION, *reprinted in* II 1980 N.A.I.C. PROC. 30, 36-37. As a practical matter, however, an insurance acquisition may be much less attractive if licenses to transact business in other states are thereby jeopardized. Consequently, regardless of the NAIC's intent, these amendments will have the effect of further delaying insurance acquisitions and subjecting the participants to additional state proceedings. Despite its assertions to the contrary, it seems that the NAIC in fact intended this result, since the penalty for an acquisition with adverse competitive effects—the denial of the right to transact further business in the state (which denial is lifted if the acquisition is not consummated)—appears geared more toward deterring acquisitions than promoting competition. It is difficult to understand how the reduced competition resulting from an insurance acquisition is remedied by removing additional insurers from the state. In any event, the increased burden on interstate commerce created by these amendments is obvious. *See* Shaffer, *supra* note 76, at 51-52. Illinois has adopted this amendment. *See* ILL. REV. STAT. ch. 73, § 743.12(a) (Supp. 1984-1985).

106. Such multiple regulation of one transaction has consistently been cited as one of the suspect burdens on interstate commerce created by the states' general business takeover laws. *See, e.g.,* Joseph E. Seagram & Sons, Inc. v. Marley, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶98,246, at 91,620 (W.D. Okla. July 17, 1981); Nathan & Moloney, *State Tender Offer Statutes: An Analysis of the Practical and Policy Considerations*, 23 N.Y.L. SCH. L. REV. 647, 652 (1978); Oldham, *supra* note 99, at 247; Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 188-89 (1976); Tiger, *supra* note 97, at 481-82; Wilner & Landy, *supra* note 97, at 20-21. The inconsistent multiple regulation of various state takeover statutes has been called the "anarchy and commercial warfare" and the "clog upon the mo-

The insurance takeover statutes thus impose a significant burden on interstate commerce. The insurance statutes are unconstitutional under the commerce clause, however, only if that burden is clearly excessive in comparison to the local benefits of the statutes.¹⁰⁷ Unlike the asserted benefits of the business takeover statutes in *Edgar*, which the Supreme Court found to be either weak or only tangentially served by the statute,¹⁰⁸ the benefits of the insurance statutes are not easily dismissed.

The predominant purpose of insurance takeover laws, as reflected in their terms and history, is protection of policyholders.¹⁰⁹ Such a purpose has long been recognized as a legitimate, indeed a paramount, objective of state insurance laws generally.¹¹⁰ Entrusted with the funds of others for proper administration, insurers, like other financial intermediaries, are

bility of commerce" that the commerce clause was designed to avoid. Silberman, Kezsbom & Sacks, *supra* note 101, at 470 & n.63. See generally *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949) (founders desired to federalize the regulation of foreign and interstate commerce through the commerce clause); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (states may not clog the mobility of commerce by creating economic barriers to the products of other states).

Coordination among the various insurance commissioners who may exercise jurisdiction in connection with a particular tender offer, perhaps even with some deferring to the findings and conclusions of another, could ease the regulatory burden. Although this already may have occurred to a limited extent, see Levi, *supra* note 103, at 219, it will be difficult to accomplish on a broad scale. Not only are there important differences among state laws, see Dew, *supra* note 12, at 106, but insurance commissioners, like other regulators, often are jealous of their regulatory prerogatives. Unfortunately, the threat of multiple regulation has not been significantly diminished by the possibility of cooperation among the states, and the commercial burden, therefore, remains.

107. The interstate commerce argument presents something of a "Catch 22" for state regulation of tender offers. If one state's statute regulates on a nationwide basis, it is said to be extraterritorial and thus imposes a heavy burden on interstate commerce. If, on the other hand, each state regulates only within its own borders, then a nationwide tender offer is subject to multiple regulation that also creates impermissible burdens for interstate commerce.

108. See *supra* notes 27-31 and accompanying text.

109. See *supra* notes 75-89 and accompanying text.

110. The protection of policyholders and, in a broader sense, the public generally traditionally has been the primary motivation of insurance regulation and has been implemented through financial regulation to preserve solvency and trade practice regulation to avoid overreaching by insurers. See *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 90-91 (1959) (Brennan, J., concurring); R. KEETON, *BASIC TEXT ON INSURANCE LAW* § 8.3, at 554-55 (1971); E. PATTERSON, *ESSENTIALS OF INSURANCE LAW* 2-3 (2d ed. 1957); Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 477-78 (1961); Kinder, *An Overview of State Insurance Regulation*, BEST'S REV. (PROPERTY/CASUALTY INS. ED.) 14, 14, 16 (July 1979).

invested with a public trust.¹¹¹ Because policyholders cannot oversee the administration of their premium dollars, state regulatory authorities have assumed the responsibility of safeguarding insurance assets needed to pay policyholder claims.

The limited extraterritorial impact of the state insurance takeover statutes is, unfortunately, a necessary evil. Although states easily can regulate both domestic and foreign insurers with respect to such matters as rates and sales practices,¹¹² regulations intended to preserve the insurer's solvency and financial stability would be impractical and inefficient if imposed on an overlapping state-by-state basis. Multiple and conflicting regulation concerning the maintenance of acceptable investments, for example, ultimately would require the insurer to maintain separate assets for the premium funds derived from each state. As recognized by the Model Act and most state insurance takeover laws, the logical recipient of regulatory power over such matters is the insurer's domiciliary state.¹¹³ The domiciliary state is likely to have the greatest contacts with the insurer, and it, unlike other states, has granted and can revoke the insurer's charter.¹¹⁴ Although the domiciliary state's regulations are extraterritorial in the sense that they affect both resident and nonresident policyholders, this extended reach does not adversely affect the policyholders. Regardless of their residency, all policyholders have an interest in the same pool of

111. 19 J. APPLEMAN, *supra* note 76, § 10,321, at 3-4; 2A G. COUCH, COUCH ON INSURANCE 2D, § 21:1, at 218 (rev. ed. 1984); W. VANCE, HANDBOOK ON THE LAW OF INSURANCE § 5, at 36 (3d ed. 1951).

112. See, e.g., ILL. ANN. STAT. ch. 73, §§ 1029, 1065.2, 1065.18-3 (Smith-Hurd 1966 & Supp. 1984); MINN. STAT. § 72A.02 (1984); N.Y. INS. LAW §§ 2302, 2402(a) (McKinney Supp. 1984); OKLA. STAT. ANN. tit. 36, §§ 901, 1002, 1202(1) (West 1976 & Supp. 1984); R.I. GEN. LAWS §§ 27-9-3, 27-29-2(a) (1979); WASH. REV. CODE ANN. §§ 48.19.010, 48.30.010 (1984).

113. See *supra* notes 15-16 and accompanying text. In addition, the domiciliary state has traditionally exercised control over the insurer's maintenance of acceptable investments. See, e.g., ILL. ANN. STAT. ch. 73, §§ 736, 785 (Smith-Hurd Supp. 1984); MINN. STAT. § 60A.11 (1984); N.Y. INS. LAW § 1402 (McKinney Supp. 1984); OKLA. STAT. ANN. tit. 36, § 1601 (West 1976); R.I. GEN. LAWS § 27-11.1-6 (Supp. 1984); WASH. REV. CODE ANN. § 48.13.010 (1984). New York, however, also conditions the right of foreign insurers to transact business in the state on compliance with many of its financial regulations. See, e.g., N.Y. INS. LAW § 1308 (McKinney Supp. 1984) (New York's limitation on credit for reinsurance, which extends to foreign insurers). Other states with similar provisions limit their scope to domestic insurers. See, e.g., ILL. ANN. STAT. ch. 73, § 785 (Smith-Hurd 1984); WASH. REV. CODE ANN. § 48.12.160 (1984).

114. See, e.g., IDAHO CODE §§ 30-1-56, -94 (1980); N.Y. BUS. CORP. LAW §§ 403, 1101 (McKinney 1963); N.Y. INS. LAW § 108 (McKinney Supp. 1984); R.I. GEN. LAWS § 27-1-14 (Supp. 1984).

insurer assets subject to the regulation.¹¹⁵

Moreover, the state insurance takeover statutes genuinely promote the protection of policyholders. The detailed disclosure requirements of these laws¹¹⁶ seek to assure that the acquisition of control, if successful, will not jeopardize the insurer's financial stability. Requiring disclosure of the offeror's identity¹¹⁷ allows examination of its expertise in managing an insurer and its reputation or possible motivation for diverting the insurer's assets. Likewise, disclosure of the source of consideration¹¹⁸ can indicate that the insurer's assets may be necessary to repay a loan, and financial statements¹¹⁹ can suggest that such assets are needed to satisfy the offeror's own financial obligations. By requiring the offeror to reveal any plans to merge, liquidate, or otherwise materially change the insurer,¹²⁰ the laws attempt to anticipate transformations of the insurer that could harm existing policyholders financially. Finally, the insurance takeover statutes do not rely solely on full disclosure to protect policyholders; they also grant the state insurance commissioner veto power over the takeover if the commissioner finds it unfair, unreasonable, or prejudicial to the policyholders.¹²¹

115. The Supreme Court has recognized this phenomenon:

Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 541-42 (1944).

116. See *supra* note 17 and accompanying text.

117. See, e.g., MODEL ACT, *supra* note 11, § 3(b)(1); ALA. CODE § 27-29-3(b)(1) (1977); D.C. CODE ANN. § 35-2003(b)(1) (1981); MICH. COMP. LAWS § 500.1312(a) (1983); MINN. STAT. § 60D.02(2)(1) (1984); OKLA. STAT. ANN. tit. 36, § 1653(b)(1) (West Supp. 1984).

118. See, e.g., MODEL ACT, *supra* note 11, § 3(b)(2); ARIZ. REV. STAT. ANN. § 20-481.03(A)(4) (1975); GA. CODE ANN. § 33-13-3(b)(2) (1982); MINN. STAT. § 60D.02(2)(2) (1984); R.I. GEN. LAWS § 27-35-2(b)(2) (1979); UTAH CODE ANN. § 31-39-2(2)(b) (Supp. 1983).

119. See, e.g., MODEL ACT, *supra* note 11, § 3(b)(3); CONN. GEN. STAT. ANN. § 38-39b(b)(3) (West Supp. 1984); IND. CODE ANN. § 27-1-23-2(b)(5) (Burns Supp. 1984); MINN. STAT. § 60D.02(2)(3) (1984); MONT. CODE ANN. § 33-2-1104(2)(c) (1983); S.C. CODE ANN. § 38-29-70(3) (Law. Co-op. 1977).

120. See, e.g., MODEL ACT, *supra* note 11, § 3(b)(4); ALASKA STAT. § 21.22.020(4) (1984); ILL. ANN. STAT. ch. 73, § 743.5(4) (Smith-Hurd Supp. 1984); MINN. STAT. § 60D.02(2)(4) (1984); N.M. STAT. ANN. § 59-7-6(A)(4) (1978); TEX. INS. CODE ANN. art. 21.49-1, § 5(c)(4) (Vernon 1981).

121. See, e.g., MODEL ACT, *supra* note 11, § 3(d)(1); ARK. STAT. ANN. § 66-

Thus, the insurance takeover statutes, unlike the unconstitutional business takeover statutes, are drawn to effectuate a legitimate purpose and succeed in substantially furthering that purpose.¹²² The statutes neither undermine their protective function¹²³ nor duplicate protections already embodied in federal law.¹²⁴ Therefore, if the insurance statutes are deemed to regulate interstate commerce only indirectly, they would be constitutional under the commerce clause, even if the McCarran-Ferguson Act is inapplicable, because the benefit of enhanced policyholder protection outweighs the burden the statutes impose on interstate commerce.¹²⁵ Invalidation of the

5005(d)(1) (1980); IOWA CODE ANN. § 521A.3(4)(a) (West Supp. 1984); MINN. STAT. § 60D.02(4)(1) (1984); S.D. CODIFIED LAWS ANN. § 58-5A-9 (1978); VT. STAT. ANN. tit. 8, § 3683(f)(1) (1984).

122. Several commentators note that the legitimate interests served by the insurance legislation are stronger than those advanced by state business takeover laws. *E.g.*, Kennedy, *supra* note 76, at 385; Profusek & Gompf, *supra* note 7, at 22-23; Fordham Note, *supra* note 57, at 955-57.

123. In *Edgar v. MITE Corp.*, the Court held that the Illinois Business Take-Over Act's extension to nonresident shareholders and exemption of tender offers by the issuer undermined the Act's purported justification of protecting resident shareholders. *See* 457 U.S. 624, 644 (1982). Like the Illinois Act, the Model Act exempts from its coverage the insurer's tender offer for its own shares. *See* MODEL ACT, *supra* note 11, § 3(a). This exemption, however, does not undermine the Act's interest in protecting the insurer's policyholders. Because the insurance statutes cover not all tender offers, but only those that result in a change of control over a domestic insurer, *see* MODEL ACT, *supra* note 11, app. § 1(c)(2), offers by insurers for their own shares are not covered because they merely consolidate rather than change control. The exemption of such offers is therefore consistent with the overall regulatory pattern.

124. The Court in *Edgar* doubted whether the Illinois Act could appreciably further its purpose of shareholder protection when federal law already provided such protection. *See* 457 U.S. 624, 644-45 (1982); *see also* Telvest, Inc. v. Bradshaw, 697 F.2d 576, 580-81 (4th Cir. 1983) (discounting significance of local benefits of Virginia business takeover law when benefits already provided by Williams Act). The rationale of minimizing duplication, however, is not present for the policyholder protections provided by state insurance takeover laws, which have no direct analogue in federal law. *See infra* notes 166-83 and accompanying text.

125. An argument can be made, however, that the benefits promoted by the statutes could be, and often are, promoted by means less burdensome on interstate commerce. For example, policyholder protection is already provided by insurance laws regulating transactions between the insurer and its affiliates, the adequacy of an insurer's surplus, and the insurer's extraordinary dividends and distributions. *See, e.g.*, MODEL ACT, *supra* note 11, §§ 5(a), (b), (c); GA. CODE ANN. §§ 33-13-5(a)(1), (a)(2), (b) (1982); IOWA CODE ANN. §§ 521A.5.1, .2, .3 (West Supp. 1984); MINN. STAT. §§ 60D.04(1), (2), (3) (1984); N.M. STAT. ANN. §§ 59-7-23, -24, -25 (1978); UTAH CODE ANN. §§ 31-39-4(1), (2), (3) (1974). In addition, policyholders are protected by statutes prohibiting deceptive practices by, and fraudulent operations of, an insurer. *See, e.g.*, National City Lines, Inc. v. LLC Corp., 524 F. Supp. 906, 911-12 (W.D. Mo. 1981)

statutes by the Williams Act and Rule 14d-2(b), however, cannot be so easily avoided.

B. PREEMPTION

Unlike the commerce clause analysis of the insurance takeover statutes, analysis of the statutes' preemption under the Williams Act and Rule 14d-2(b) is unaffected by the McCarran-Ferguson Act. By adoption of McCarran-Ferguson, Congress did not relinquish its power to legislate in, and thus preempt, an area covered by state insurance regulation. It merely indicated that its silence would not bar state regulation of insurance,¹²⁶ providing that no congressional enactment would preempt a state's regulation of insurance "unless such Act specifically relates to the business of insurance."¹²⁷ Consequently, the Williams Act and Rule 14d-2(b) can preempt state insurance statutes only if the Act specifically relates to the "business of insurance."

The Williams Act does contain a specific and express reference to insurance company securities:

It shall be unlawful for any person, directly or indirectly, . . . to make a tender offer for . . . any class of any equity security which is registered pursuant to section 12 of this title, or *any equity security of an insurance company* which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title¹²⁸

(discussing provisions of Missouri Insurance Holding Company Act), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982). The insurance takeover statutes would be unconstitutional under the commerce clause if their protections could be promoted by less restrictive means. *See generally* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (state cannot discriminate against interstate commerce if the legitimate local interest can be protected by less restrictive alternatives). Since the less restrictive means would be inadequate to effectuate the goal of policyholder protection, *see infra* notes 180-83 and accompanying text, however, the state statutes are constitutional under the commerce clause as long as the local benefits outweigh the incidental burden on interstate commerce.

126. 15 U.S.C. § 1011 (1982).

127. *Id.* § 1012(b). The federal law is deemed to "specifically relate" to the business of insurance only if it contains an express indication to that effect. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946); *Spirit v. Teachers Ins. & Annuity Ass'n*, 475 F. Supp. 1298, 1301 (S.D.N.Y. 1979). A mere failure to exempt insurance from an act's scope is not a sufficiently express reference to bypass McCarran-Ferguson. *Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979).

128. Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1982) (emphasis added). The same reference to insurance company securities appears in the section governing disclosure requirements for 5% beneficial owners. *Id.* § 13(d)(1), 15 U.S.C. § 78m(d)(1).

Although this language indicates the intent of Congress to include tender offers for insurance companies within the Act's coverage, in *John Alden Life Insurance Co. v. Woods*,¹²⁹ a federal district court held that the language did not overcome the McCarran-Ferguson barrier. The court reasoned that a federal law must either expressly declare that it preempts state insurance law or contain the words "business of insurance" before it will be held to supersede state insurance law.¹³⁰ The court further stated that the Williams Act deals only with the regulation of securities and, as such, does not relate to the business of insurance.¹³¹

The *John Alden* court's conclusion that preemption results only if the federal statute contains certain specified words goes well beyond the terms of the McCarran-Ferguson Act. Congress's promise in the Act is simply that it will "speak out" if it intends a federal statute passed under the commerce clause to apply to the business of insurance.¹³² The reference in the Williams Act to insurance company equity securities is an explicit statement of congressional intent to regulate tender offers for target insurers. Moreover, the court's suggestion that this regulation of tender offers does not relate to the "business of insurance" conflicts with its conclusion earlier in the opinion that state insurance takeover statutes do regulate the business of insurance.¹³³ The inescapable conclusion is that the Williams Act specifically refers to the "business of insurance," making the McCarran-Ferguson protections inapplicable.¹³⁴

Without the protection of the McCarran-Ferguson Act, the state insurance takeover laws will be preempted if they unduly conflict with the terms or policies of the Williams Act and the rules promulgated thereunder. The clearest such conflict is created by Rule 14d-2(b), which requires that an offer be com-

129. [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,617 (D. Idaho Dec. 19, 1981).

130. *Id.* at 93,066.

131. *Id.*

132. See *Perry v. Fidelity Union Life Ins. Co.*, 606 F.2d 468, 483 (5th Cir. 1979), *cert. denied*, 446 U.S. 987 (1980).

133. *John Alden*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) at 93,064-65.

134. See *Sun Life Group, Inc. v. Standard Life Ins. Co.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314, at 97,117-18 (S.D. Ind. Mar. 12, 1980) ("Section 14d . . . refers expressly by its terms to insurance companies. As a result, the McCarran-Ferguson Act . . . is inapplicable by its terms."). But see Shaffer, *supra* note 76, at 58 (characterizing the analysis from *John Alden* as "a powerful argument based upon the express congressional mandate in McCarran-Ferguson").

menced within five days of the announcement of its material terms.¹³⁵ In contrast, the insurance statutes generally prohibit the offer's commencement until approved by the insurance commissioner¹³⁶ and require that the approval come only after a public hearing.¹³⁷ An offeror cannot comply literally with both Rule 14d-2(b) and these provisions.¹³⁸ The commencement of the offer will, without exception, be delayed beyond five days by the state hearing and approval requirements.¹³⁹ Moreover, the resulting delay frustrates the Rule's purpose of forcing prompt dissemination of information after the offer's first public announcement, which dissemination is intended to avoid precipitating significant market activity that could impel public investors to make immediate and uninformed decisions.¹⁴⁰

In *Sun Life Group, Inc. v. Standard Life Insurance Co.*,¹⁴¹ another federal district court attempted to avoid this conflict by allowing an offer to commence in accordance with Rule 14d-2(b) as long as it was conditioned on state regulatory approval following the necessary hearing.¹⁴² The court found that such harmonization of state and federal law served the public interest because it encouraged, rather than hindered, the dissemination of information to the target's shareholders.¹⁴³ In an interpretative release, the Securities and Exchange Commission staff approved of this "conditional offer" approach.¹⁴⁴

135. Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b) (1984).

136. See MODEL ACT, *supra* note 11, § 3(a).

137. See *id.* § 3(d)(1); *infra* note 146.

138. See *National City Lines, Inc. v. LLC Corp.*, 524 F. Supp. 906, 910 (W.D. Mo. 1981), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982); Shaffer, *supra* note 76, at 50-51.

139. The hearing provisions of the Model Act also may conflict with, and therefore be preempted by, Rule 14d-7, 17 C.F.R. § 240.14d-7 (1984), which authorizes the offeror to purchase tendered shares as soon as 15 business days after commencement of the offer. See Shaffer, *supra* note 76, at 52-54.

140. See *Kennecott Corp. v. Smith*, 637 F.2d 181, 182-83 (3d Cir. 1980); Release No. 34-16,384, *supra* note 51, at 70,329-36, *reprinted in* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,583-84.

141. [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,314 (S.D. Ind. Mar. 12, 1980).

142. *Id.* at 97,117.

143. *Id.* at 97,118.

144. The staff answered "yes" to the question: "Can a bidder's acceptance for payment of securities tendered in response to a tender offer be conditioned upon the obtaining of a state or federal regulatory approval?" Exchange Act Release No. 16,623 (March 5, 1980), *reprinted in* 544 SEC. REG. & L. REP. (BNA) G-1 (1980). This release has been relied on as authority for the conditional offer approach to avoid conflicts between Rule 14d-2(b) and state busi-

Although the *Sun Life* result is appealing, its analysis fails to avoid the direct conflict between Rule 14d-2(b) and the state provisions. Many state insurance takeover statutes do not permit the conditional offer contemplated by *Sun Life*. The Model Act, for example, states in its barest essentials:

No person . . . shall make a tender offer for . . . any voting security of a domestic insurer . . . unless, at the time any such offer . . . is made . . . , such person has filed with the Commissioner and has sent to such insurer . . . a statement containing the information required by this section and such offer . . . has been approved by the Commissioner in the manner hereinafter prescribed.¹⁴⁵

This provision unambiguously requires that the offeror must already have filed its disclosure statement and received the commissioner's posthearing approval at the time it makes the offer.¹⁴⁶ An offer made in advance of the commissioner's ap-

ness takeover statutes. See Sargent, *On the Validity of State Takeover Regulation: State Responses to MITE and Kidwell*, 42 OHIO ST. L.J. 689, 710 (1981); Comment, *State Regulation of Tender Offers*, 7 J. CORP. L. 603, 617-18 (1982); see also Release No. 34-16,384, *supra* note 51, at 70,330, reprinted in [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584 (recognizing that regulatory approvals may be required before bidder is allowed to purchase shares).

In an amicus curiae memorandum submitted to the court in *Sun Life*, however, the Commission suggested that the waiting and hearing provisions of the Indiana Insurance Holding Company Act were not deemed to have a "severe, adverse impact on the operation of the Williams Act, assuming an expeditious hearing and resolution of the relevant issues." See Kennedy, *supra* note 76, at 385 n.73 (quoting Brief for SEC, amicus curiae, at 5 n.5, *Sun Life*). Taken together, these various pronouncements by the Commission suggest that, although such conditional offers are not inconsistent with Rule 14d-2(b), conflicts remain between the state insurance hearing provisions and the other purposes and objectives of the Williams Act. See *infra* notes 151-64 and accompanying text.

145. MODEL ACT, *supra* note 11, § 3(a). Most state insurance holding company acts contain comparable provisions. See, e.g., ARK. STAT. ANN. § 66-5005(a) (1980); IOWA CODE ANN. § 521A.3(1) (West Supp. 1984); MICH. COMP. LAWS ANN. § 500.1311(1) (West 1983); MINN. STAT. § 60D.02(1) (1984); NEV. REV. STAT. § 692C.180(2) (1979); OKLA. STAT. ANN. tit. 36, § 1653(a) (West Supp. 1984); S.D. CODIFIED LAWS ANN. § 58-5A-3 (1978). For examples of state provisions that are materially different, see *infra* note 148.

146. The wording of the Model Act has created some doubt concerning whether a hearing must be held in all cases. Section 3(d)(1) states, in relevant part, that "[t]he Commissioner shall approve any . . . acquisition . . . unless, after a public hearing thereon, he finds that" one of six enumerated disqualifications apply. MODEL ACT, *supra* note 11, § 3(d)(1). Many states have copied this somewhat ambiguous provision verbatim from the Model Act. See, e.g., COLO. REV. STAT. § 10-3-803(5) (1974); GA. CODE ANN. § 33-13-3(f)(1) (1982); KAN. STAT. ANN. § 40-3304(d)(1) (Supp. 1983); N.M. STAT. ANN. § 59-7-7 (1978); R.I. GEN. LAWS. § 27-35-2(d)(1) (1979). This provision could be interpreted to require a hearing only if the transaction is not approved and to allow the insurance commissioner to approve without a hearing. The intent of the draft-

proval violates the straightforward language of the Model Act.¹⁴⁷ Therefore, any statute that includes this provision of the Model Act cannot be saved from direct conflict with Rule 14d-2(b) by conditional offers.¹⁴⁸

ers, however, was to require a public hearing in all cases. *See Seiler, supra* note 8, at 345. *But see* REPORT ON POSSIBLE AMENDMENTS TO THE NAIC MODEL INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT, *reprinted in* 1978 N.A.I.C. PROC. 220, 222 (hearing is optional with the commissioner). This interpretive problem does not arise in the states that unambiguously require a hearing in all cases, *see, e.g.,* ARIZ. REV. STAT. ANN. § 20-481.07(A) (1975); CONN. GEN. STAT. ANN. § 38-39d(a) (West Supp. 1984); IND. CODE ANN. § 27-1-23-2(d)(1) (Burns Supp. 1984), specify that a hearing is required only when the commissioner disapproves the transaction, *see, e.g.,* IDAHO CODE § 41-3805(1) (Supp. 1984), make a hearing optional, *see, e.g.,* ILL. ANN. STAT. § 743.8(2) (Smith-Hurd Supp. 1984), or require no hearing at all, *see, e.g.,* MD. ANN. CODE art. 48A, § 494(e) (1979); NEB. REV. STAT. § 44-2108 (1984).

147. One commentator has noted that permission for such conditional offers "may require a contortion of the state statute if it follows the wording of the NAIC Model Act." Kennedy, *supra* note 76, at 385 (footnote omitted). Moreover, using this tactic to avoid conflict with Rule 14d-2(b) would not work under most state takeover laws applicable to general business corporations. *See, e.g.,* Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1213 (D.N.J. 1981) ("Neither the legislative history nor the past administration of the New Jersey Takeover Law supports a construction of the statute that would permit a hearing . . . after a tender offer has commenced."). The New York takeover statute, however, was amended to authorize the attorney general to prohibit a bidder from purchasing or paying for shares, but not from disseminating the offer or receiving tenders, pending a hearing or investigation. Act of June 30, 1980, ch. 733, sec. 2, § 1605(a), 1980 N.Y. Laws 1869, 1869 (codified at N.Y. BUS. CORP. LAW § 1605(a) (McKinney Supp. 1984-1985)); *see* Shapiro, *State Takeover Laws*, 12 ANN. INST. SEC. REG. 401, 418 (PLI Corp. L. & Prac. Course Handbook Series, no. 348) (1980).

148. The Florida act, FLA. STAT. ANN. § 628.461 (West 1984), has been interpreted to require that "the Department of Insurance . . . approve the proposed offer before any form of tender offer can be made to security holders." *Gunter v. Ago Int'l*, 533 F. Supp. 86, 90 (N.D. Fla. 1981). That an offer could not be made in advance of commissioner approval was clearly stated in earlier drafts of the Model Act: "Until all requirements of this section have been complied with no person shall make a tender offer for . . . any voting security of a domestic insurer" DRAFT NAIC HOLDING COMPANY BILL § 4, I 1969 N.A.I.C. PROC. 200, 202.

For an example of a state insurance takeover statute that, instead of following the Model Act in this respect, specifically provides for such conditional offers, *see* ALA. CODE 27-29-3(a)(2) (1977). Laws of several other states also deviate from the Model Act and can be interpreted as permitting, although not expressly authorizing, conditional offers. For example, some statutes prohibit the acquisition of control, but not the offer for control, in advance of regulatory approval. *See, e.g.,* ALASKA STAT. § 21.22.030(b) (1984); ARIZ. REV. STAT. ANN. § 20-481.07(A) (1975); CAL. INS. CODE § 1215.2(d) (West Supp. 1984); LA. REV. STAT. ANN. § 22:731 (West 1978); N.Y. INS. LAW § 69-e (McKinney Supp. 1984); TENN. CODE ANN. § 56-10-204 (1980); VA. CODE § 38.1-178.1:1 (1980). The insurance laws of Idaho also could be interpreted similarly. *See* IDAHO CODE §§ 41-3805(1), -3802(1) (Supp. 1984) (prohibiting tender offers prior to filing

Moreover, the conditional offer rationale would avoid conflict with Rule 14d-2(b) only when the offer is, in fact, conditional. Most offerors for control of insurers probably will attempt to escape burdensome state requirements by precipitating a conflict through the use of unconditional offers. In such situations, the insurance regulator and target might assert that the offeror's ability to make a conditional offer removes the impossibility of compliance with both federal and state law¹⁴⁹ and that the offeror should be estopped from asserting preemption because it voluntarily rejected a course that could accommodate both. A court, however, should dismiss this argument and look only to the facts before it, not to those that could have existed.¹⁵⁰ If the offeror's making an unconditional offer is permissible under federal law, that a different course of action could have satisfied state law as well is irrelevant.

Even when state law permits conditional offers in order to avoid conflict with federal law, preemption problems remain. A hearing that delays completion of the tender offer and substitutes the decision of the insurance commissioner for that of the target's shareholders frustrates the underlying objectives of the Williams Act regardless of whether it is conducted before or during the offer.¹⁵¹ These state law provisions give management time to employ various defensive maneuvers to combat

with the director, thereby implying that conditional offers can be made after filing).

149. Impossibility of compliance with state and federal law is grounds for preemption of the former. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

150. In *Kennecott Corp. v. Smith*, 637 F. 2d 181 (3d Cir. 1980), an offeror chose not to make the limited public announcement permitted by state law that would have avoided triggering the five-day deadline of Rule 14d-2(b). The court nevertheless refused to consider what the outcome would have been had the offer not precipitated the state-federal conflict:

Thus, the "safe harbor" provision [of state law] does not obviate the constitutional problem posed here. The issue in this preemption case is whether the impact of the New Jersey law on the course actually pursued by [the offeror]—an action it was entitled to take under federal law—conflicted with the Williams Act and SEC regulations. Preemption analysis focuses on whether the State law serves as an obstacle to the operation of federal law "in the circumstances of this particular case," rather than in all cases or in a hypothetical case.

Id. at 188 (quoting *Jones v. Roth Packing Co.*, 430 U.S. 519, 525-26 (1977)).

151. Delay in consummation of a tender offer is as powerful a management tool as is delay in commencement of the offer. *See, e.g.*, *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1130 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1215 (D.N.J. 1981). Moreover, one author has suggested that if the scope of the hearing extends to the substantive fairness of the offer rather than merely the adequacy of disclosure, the conditional

the offer, including bringing in a "white knight," arranging a defensive merger, and issuing additional shares.¹⁵² If such tactics are successful, the offer will be defeated before the shareholders have a chance to consider it. Furthermore, although the Model Act requires that the hearing commence within thirty days of the offeror's filing of its disclosure statement and that the commissioner render a decision within thirty days of the hearing's conclusion, the Act places no limit on the duration of the hearing.¹⁵³ Most statutes permit management to maximize this delay by allowing the target corporation, as well as other interested persons, to participate in and prolong the hearing by presenting evidence, examining and cross-examining witnesses, and offering oral and written arguments.¹⁵⁴ The Act also allows the target to appeal an adverse decision by the commissioner, which may involve a trial de novo.¹⁵⁵

purchase rationale will not save the state law. See Comment, *supra* note 144, at 617-18.

152. See *Edgar v. MITE Corp.*, 457 U.S. 624, 636-39 (1982); see also Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 238 (1977) (describing the importance of time to the target's management); Wachell, *Special Tender Offer Litigation Tactics*, 32 BUS. LAW. 1433, 1437-42 (1977) (describing specific tactics). Delay also provides time for the operation of normal market forces. Thus, the offer may become economically less desirable for shareholders as the market price of the target's securities approaches the offering price, and such an increase in the market price is likely if the offering price is disclosed. Wilner & Landy, *supra* note 97, at 10.

153. Model Act, *supra* note 11, § 3(d)(2). For comparable state statutes, see D.C. CODE ANN. § 35-2003(d)(2) (1981); MASS. GEN. LAWS ch. 175, § 193m(d)(2) (Michie/Law. Co-op. 1977); MO. ANN. STAT. § 382.060(3) (Vernon Supp. 1985); S.C. CODE ANN. § 38-29-90(2) (Law. Co-op. 1977); VT. STAT. ANN. tit. 8, § 3683(f)(2) (1984). Some states permit considerably greater delay in securing the commissioner's decision. For example, many states require the hearing to commence within 60 days after filing, e.g., ILL. ANN. STAT. ch. 73, § 743.8(3) (Smith-Hurd Supp. 1984); MINN. STAT. § 60D.02(4)(2) (1984); W. VA. CODE § 33-27-3(d)(2) (1982); Connecticut requires the hearing to commence within 180 days and places no deadline on the commissioner to reach a decision, CONN. GEN. STAT. ANN. § 38-39d(a) (West Supp. 1984); and Kansas simply directs that the hearing commence "as soon as practicable" but places no time limit on either commencement of the hearing or announcement of the commissioner's decision, KAN. STAT. ANN. § 40-3304 (1981).

154. See MODEL ACT, *supra* note 11, § 3(d); see also Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1214 (D.N.J. 1981) (discussing the target's opportunity under state law to participate in the hearing and the impermissible delay created by such hearing); *Parents and Subsidiaries*, *supra* note 9, at 180 (giving specific advice on how to prolong the hearing and delay the offer).

155. See MODEL ACT, *supra* note 11, § 13; Vinyard, *supra* note 103, at 22. For comparable state provisions, see ALA. CODE § 27-29-13 (1977); MINN. STAT. § 60D.12 (1984); NEV. REV. STAT. § 692C.490 (1979); N.H. REV. STAT. ANN. § 401-B:14(I) (1983); S.C. CODE ANN. § 38-29-360(a) (Law. Co-op. 1977).

The indefinite delay in the consummation of the offer caused by these provisions immeasurably increases management's ability to repulse the offer. This advantage defeats the Williams Act's balance of neutrality between the offeror and the target management¹⁵⁶ by allowing management a greater opportunity to sway the shareholders' decision.¹⁵⁷ Since this delay has the same effect whether it occurs before or during the offer, this interference with federal law cannot be avoided by a conditional offer. The hearing provisions are therefore preempted by the supremacy clause regardless of any conditions that may be placed on the offer.

The disclosure provisions of the state insurance takeover statutes also raise preemption problems. Because the Model Act's disclosure requirements were drawn primarily for the protection of policyholders rather than shareholders,¹⁵⁸ it is not surprising that they call for some information not required under the Williams Act.¹⁵⁹ Despite this difference in the purposes of the insurance statutes and the Williams Act, however, courts have cited the burdens imposed on the offeror by such supplementary disclosure requirements as a ground for invali-

156. See *Edgar v. MITE Corp.*, 457 U.S. 624, 630-34 (1982). The House Interstate and Foreign Commerce Committee report on the Williams Act reflects this goal of neutrality:

It was urged during the hearings that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management. It was also recognized that these bids are made for many other reasons, and do not always reflect a desire to improve the management of the company. *The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.* It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813 (emphasis added).

157. See *National City Lines v. LLC Corp.*, 524 F. Supp. 906, 911 (W.D. Mo. 1981), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982). Courts have struck down hearing provisions in state business takeover statutes precisely because of the effect of this delay on the neutrality of the Williams Act. See, e.g., *Bendix Corp. v. Martin Marietta Corp.*, 547 F. Supp. 522, 532 (D. Md. 1982); *Crane Co. v. Lam*, 509 F. Supp. 782, 784-85 (E.D. Pa. 1981); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1217-18 (D.N.J. 1981).

158. See *supra* notes 109-21 and accompanying text.

159. See Shaffer, *supra* note 76, at 54-55 (giving some specific examples of the differences). Compare MODEL ACT, *supra* note 11, § 3(b) and Form A, IIB 1970 N.A.I.C. PROC. 1060 (Model Act disclosure requirements) with Exchange Act, § 13(d), 15 U.S.C. § 78m(d) (1982) and Schedule 14D-1, Rule 14d-100, 17 C.F.R. § 240.14d-100 (1984) (Williams Act disclosure requirements).

dating insurance takeover statutes,¹⁶⁰ just as they have done with respect to general business takeover statutes.¹⁶¹

Finally, the state insurance laws and the Williams Act differ regarding who determines the success of the offer. The Williams Act embodies a "market approach," the objective of which is to provide the target shareholders with necessary information but to allow them to decide for themselves whether to tender.¹⁶² By vesting a state official with the power to decide whether the offer can proceed, the state statutes instead adopt a "benevolent bureaucracy" approach, under which the state official, rather than the individual investor, can determine the fate of the offer.¹⁶³ This shift of power hinders the accomplishment of the Williams Act's objectives and thus invalidates the approval provisions of state insurance takeover statutes.¹⁶⁴

160. See *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 90 (N.D. Fla. 1981); *National City Lines, Inc. v. LLC Corp.*, 524 F. Supp. 906, 911 (W.D. Mo. 1981) (insurance takeover statute unconstitutional), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982) (insurance takeover statute inapplicable to transaction at issue).

One student commentator disputes this result, but her arguments are not persuasive. See Fordham Note, *supra* note 57. First, she argues that the Williams Act is only a minimum disclosure statute and that it does not require the proper amount of disclosure. *Id.* at 966. The authorities, however, do not support her conclusion. See, e.g., *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1132 (8th Cir. 1982); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1280-81 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). Second, she states that additional disclosures are justifiable in view of the statutory objective of policyholder protection. Fordham Note, *supra* note 57, at 966. That the state statutes have a different purpose, however, does not eliminate their conflict with the operation of federal law. Finally, she states that the additional disclosures are provided to the insurance commissioner who has the expertise necessary to comprehend them. *Id.* This overlooks the Model Act requirement that the target insurance company distribute those same disclosures to its shareholders, thereby potentially confusing the same investors the Williams Act sought to protect from excessive disclosures. See MODEL ACT, *supra* note 11, § 3(a).

161. See *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1131-32 (8th Cir. 1982); *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1221 (D.N.J. 1981); *Dart Indus., Inc. v. Conrad*, 462 F. Supp. 1, 13 (S.D. Ind. 1978); E. ARANOW, H. EINHOWN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* 228 (1977); Tiger, *supra* note 97, at 470-71.

162. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 22-24 (1977); *Kennecott Corp. v. Smith*, 637 F.2d 181, 190 (3d Cir. 1980); *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1276-78 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

163. See *MITE Corp. v. Dixon*, 633 F.2d 486, 494 (7th Cir. 1980), *aff'd sub nom. Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Hi-Shear Indus., Inc. v. Campbell*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,036-37 (D.S.C. Dec. 4, 1980).

164. See *Gunter v. AGO Int'l B.V.*, 533 F. Supp. 86, 90 (N.D. Fla. 1981); Na-

Since no part of the typical insurance takeover statute can stand without the hearing, disclosure, and commissioner approval provisions, the unconstitutionality of these provisions causes the entire statute to fall.¹⁶⁵ Although the Williams Act will continue to protect the target insurer's shareholders, invalidation of the state insurance takeover statutes leaves unprotected a class of individuals for whom the states have long assumed the duty of protection—the insurer's policyholders.

tional City Lines, Inc. v. LLC Corp., 524 F. Supp. 906, 911 (W.D. Mo. 1981), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982); Kennedy, *supra* note 76, at 384; Shaffer, *supra* note 76, at 54. The incompatibility of such hearing requirements with the Williams Act also has been cited as a reason for invalidating general business takeover statutes. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 639-40 (1982) (plurality opinion); National City Lines v. LLC Corp., 687 F.2d 1122, 1131 (8th Cir. 1982); Kennecott Corp. v. Smith, 507 F. Supp. 1206, 1220 (D.N.J. 1981); Hi-Shear Indus., Inc. v. Campbell, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,804, at 90,038 (D.S.C. Dec. 4, 1980); Esmark, Inc. v. Strode, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,828, at 94,246 (Ky. Oct. 12, 1982); Sargent, *supra* note 144, at 719-20. Although both types usually are invalidated, a hearing that extends to the substantive fairness of the offer is even more offensive to the market approach than is one limited to determining compliance with the disclosure requirements. *See National City Lines*, 687 F.2d at 1131; *Esmark*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) at 94,246; Sargent, *supra* note 144, at 720. The hearing mandated by the Model Act clearly falls within the first category. *See* MODEL ACT, *supra* note 11, § 3(d)(1)(v).

In Fordham Note, *supra* note 57, the author argues that the insurance statutes do not substitute the insurance commissioner's judgment for the investor's judgment because the commissioner is in fact acting in the interests of policyholders. *Id.* at 964-65. This contention, however, ignores the simple fact that an adverse decision by the commissioner precludes shareholders from accepting the offer to the same extent as do similar provisions in the state business takeover statutes.

165. The insurance takeover provisions, however, are only part of the holding company acts. *See supra* note 14 and accompanying text. Arguably, invalidation of these acquisition of control sections does not affect the Model Act's other sections, including those relating to subsidiaries, MODEL ACT, *supra* note 11, § 2, the registration of insurers, *id.* § 4, and transactions with affiliates, *id.* § 5(a). To survive, these sections must be severable from the acquisition of control sections. Whether a provision is severable depends on whether the legislature would have passed the remaining provisions alone. In making this determination, courts look to whether the remaining portions are independent of the invalid sections, are capable of separate enforcement, form a complete act, and are reasonable when standing alone. 2 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 44.03, at 338 (4th ed. 1973) (revision of SUTHERLAND, STATUTORY CONSTRUCTION). The remaining sections of most state holding company acts seem to meet these tests and therefore survive the invalidation of the acquisition of control sections.

III. THE POLICYHOLDER AS THE UNINTENDED VICTIM OF THE INVALIDATION OF STATE INSURANCE TAKEOVER STATUTES

The invalidation of state insurance takeover statutes leaves the Williams Act as the principal control over tender offers for insurers. Unlike the insurance laws,¹⁶⁶ however, the Williams Act does not purport to protect the insurer's policyholders; the Act's sole purpose is to protect the target's shareholders.¹⁶⁷ Following the demise of the insurance takeover laws, therefore, the most vulnerable party in an insurance takeover will be left without a regulatory guardian.

The legislative history of the Williams Act confirms that Congress's primary purpose in passing the Act was to fill the regulatory gap that left shareholders who were confronted with a cash tender offer without the protections available in proxy contests, exchange offers, and other acquisition vehicles.¹⁶⁸ To this end, the Williams Act requires the offeror to inform the shareholders of all facts relevant to their decision whether to tender.¹⁶⁹ The SEC, in fashioning rules for the implementation of the Williams Act, has remained loyal to this overarching purpose of investor protection.¹⁷⁰ The supposed "secondary" goal of the Williams Act, neutrality between the offeror and incumbent management, actually is merely one of the means of achieving shareholder protection. For a shareholder to make an informed decision in a hostile tender offer, the shareholder must hear the conflicting positions of the offeror and management. The shareholder receives the necessary information only when the governing legislation strikes a balance of neutrality between the opposing parties and allows neither to preclude the other from communicating its message to the shareholders.¹⁷¹

166. See *supra* notes 75-89 & 109-121 and accompanying text.

167. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977).

168. See *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 15, 19 (1967) (statement of Manuel F. Cohen, SEC Chairman); S. REP. NO. 550, 90th Cong., 1st Sess. 4 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 4-5, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2813-14; 114 CONG. REC. 21,481 (1968) (statement of Rep. Moss); 113 CONG. REC. 24,662 (1967) (statement of Sen. Williams).

169. See *supra* notes 35-39 and accompanying text.

170. See generally Release No. 34-16,384, *supra* note 51 (adoption of new tender offer rules); Release No. 34-15,548, *supra* note 51 (proposing same).

171. See *Bunch, Edgar v. MITE Corporation: A Proposed Analysis*, 17

Because of the Williams Act's single-minded purpose, the invalidation of the first generation business takeover statutes had only a minimal substantive impact. These state statutes, after all, also sought to promote shareholder protection.¹⁷² As a result, the objective of the state statutes was not abandoned, but merely achieved under other regulations. The insurance takeover statutes, however, seek primarily to protect the target insurer's policyholders.¹⁷³ This goal requires a far different regulatory scheme than that necessary for shareholder protection. Consequently, the substantive impact of the invalidation of the insurance takeover statutes is enormous and, for the insurer's policyholders, entirely negative.

Protection of policyholders cannot be achieved under the Williams Act. Consistent with its underlying rationale, the Williams Act is grounded on the theory that a shareholder can make an informed decision between contestants if given adequate and nonfraudulent disclosures. The Act furthers its market approach by taking a neutral position with respect to the tender offer contestants, permitting the shareholder to make the ultimate decision. This position represents the antithesis to the Model Act's theory of substantive merit regulation, under which a state official unilaterally can bar the transaction if the official determines that it is "unfair and unreasonable."¹⁷⁴ Unfortunately, policyholder protection cannot be achieved by the disclosure model of the Williams Act.¹⁷⁵ Disclosure is an effective tool only if the individual who receives the information can act on it. Consequently, disclosure to policyholders would be futile because they are powerless to accept or reject the proposal.¹⁷⁶ To protect the policyholders, therefore, the power to de-

TULSA L.J. 229, 241 (1981); McCauliff, *Federalism and the Constitutionality of State Takeover Statutes*, 67 VA. L. REV. 295, 303 (1981); Sargent, *supra* note 144, at 714-15; Note, *The Validity of State Tender Offer Statutes: SEC Rule 14d-2(b) and Post-Kidwell Federal Decisions*, 38 WASH. & LEE L. REV. 1025, 1052-53 (1981); Comment, *State Regulation of Tender Offers: How Much is Constitutional?*, 33 BAYLOR L. REV. 657, 667 (1981).

172. See *Edgar v. MITE Corp.*, 457 U.S. 624, 644-45 (1982) (state's justification of takeover act); *supra* note 27 and accompanying text.

173. See *supra* notes 109-21 and accompanying text.

174. See, e.g., MODEL ACT, *supra* note 11, § 3(d)(1)(iv). Similar standards frequently are set forth in state securities statutes for the review of new offerings by the securities commissioner. See CAL. CORP. CODE § 25,140 (West 1977) (suspension of qualification if issuance is "not fair, just, or equitable"); R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 105-06 (5th ed. 1982) (noting substantive review under state "blue sky" laws).

175. See *supra* notes 33-39 & 159 and accompanying text.

176. This futility is evident in the Model Act's requirement of disclosure to

termine the outcome of the transaction necessarily must be vested in a third party.

The target's shareholders, of course, have the power to determine the success or failure of the offer. The shareholders, however, cannot be expected to decide whether to tender their shares based on the needs of the insurer's policyholders. Unlike tendering shareholders, policyholders will retain their relationship with the target even after a successful tender offer and therefore are concerned with the effect of the transaction on their future security. In stark contrast, the primary concern of the shareholders is whether the offered price is fair and provides a sufficient premium over the market price. As with their initial decision to invest, the shareholders' decision to tender will be based on their own economic self-interest.¹⁷⁷

Any expectation that shareholders will look out for policyholders in making their decision whether to tender their shares, therefore, is unrealistic. To the extent that shareholders consider disclosures relevant to the offer's future impact on the insurer,¹⁷⁸ the consideration is probably motivated by the shareholders' interest in the adequacy of the price offered. If an individual shareholder suspects that a successful offer will adversely affect the insurer, for example, the shareholder might tender to avoid retaining an interest in the insurer after

the shareholders, but not to the policyholders, of the target insurer. See MODEL ACT, *supra* note 11, § 3(a). Disclosures to policyholders could serve the limited function of enabling them to make an informed decision on whether to change insurers following a successful tender offer. Even for this narrow purpose, however, the disclosures would be largely ineffective. Those insureds holding whole life policies or who no longer are insurable may not have the option of changing insurers. Moreover, requiring policyholders to make the "investment decision" of remaining with or changing their insurer would be a novel concept and would demand a level of sophistication that is unrealistic to expect from most policyholders. See *infra* notes 211-12 and accompanying text.

177. Former SEC Chairman Williams recognized that, under the market approach, the success or failure of the offer depends only on the price paid for the target's shares. McCauliff, *supra* note 171, at 311. One of the policies of the Williams Act is to preserve the shareholders' right to determine their own economic self-interest. See *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1218 (D.N.J. 1981). In that sense, most of the disclosures required by the securities laws generally pertain to matters having a direct bearing on the investor's economic self-interest. See Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 CASE W. RES. L. REV. 722, 733 (1970).

178. The offeror must disclose its background, identity, and financial statements, the source and amount of funds offered, and the future plans for the target. See Exchange Act §§ 13(d), 14(d), 15 U.S.C. §§ 78m(d), 78n(d) (1982); Schedule 14D-1, Rule 14d-100, 17 C.F.R. § 240.14d-100 (1984).

the offeror's acquisition of control. In other words, an offer perceived to be harmful to the insurer might cause the shareholder to accept what otherwise would have been a less than desirable price, thereby improving the chances of the takeover bid. The future of the insurer is thus dependent on the shareholders' compensation, not the policyholders' needs.¹⁷⁹

Invalidation of the state insurance takeover statutes, therefore, leaves policyholders unprotected against an injurious takeover of the insurer. To a certain extent, other insurance statutes may deter some of the prejudicial effect of an adverse tender offer, if not the takeover itself. For example, the Model Act declares in general terms that transactions between the insurer and affiliates must be fair and reasonable.¹⁸⁰ It also provides that notice of an insurer's extraordinary dividends or distributions must be submitted in advance to the insurance commissioner.¹⁸¹ These after-the-fact regulations, however, are insufficient to furnish the desired level of policyholder protection. Although these regulations can avoid some abuses by the new management, they cannot anticipate all of them.¹⁸² In the Baldwin-United disaster, for example, such regulation of transactions between affiliates in an insurance holding company failed to prevent abuses leading to the biggest insurance failure in history.¹⁸³ The large number of state proceedings seeking

179. Undoubtedly, some shareholders will refuse to tender because of concerns about the offer's future impact on the target. To assume that any more than a relative handful will react in this manner, however, contradicts the underlying and patently sensible assumption of the securities laws that investors act in their own economic self-interest. See *supra* note 177 and accompanying text. The resulting irony is that, given an adequate offering price, the more harmful a takeover is, the more likely it is that it will succeed.

180. MODEL ACT, *supra* note 11, § 5(a)(1).

181. *Id.* § 5(c).

182. For example, the monitoring of transactions among affiliates in an insurance holding company system could not prevent a holding company from curtailing its insurance subsidiary's underwritings or from slowly but deliberately siphoning off the insurer's assets over an extended period of time. See Note, *supra* note 76, at 661 n.170. The Connecticut Insurance Commissioner's original disapproval of the merger between ITT and Hartford implicitly "recognized that once a merger was consummated there could be no guarantee that funds would not be diverted from insurance or that the state's insurance laws would not be circumvented." *Id.* at 661.

183. In this fiasco, Baldwin-United Corporation's announcement that it intended to finance another acquisition with funds earned by its insurance subsidiaries through annuity sales triggered an unscheduled examination of three insurance subsidiaries domiciled in Arkansas. In its examination, the Arkansas Insurance Department uncovered a \$280 million shortfall in the investment portfolio supporting the value of the annuities. The investigation revealed that the shortfall resulted from the investment of a portion of the

the rehabilitation or liquidation of insurers that are insolvent or have surplus that is impaired stands as a monument to the inadequacies of financial regulation of insurers and the need for some additional type of protection for policyholders.

IV. RESTORATION OF POLICYHOLDER PROTECTION: POLICIES AND PROPOSALS FOR LEGISLATIVE ACTION

Despite the unconstitutionality of current state insurance takeover statutes, the need to protect policyholders of target insurance companies remains. Unfortunately, this is a need that the Williams Act was not designed to address. Several routes, however, are potentially available for reviving state protection of policyholders in a manner that does not impermissibly conflict with the federal regulatory scheme.

A. POLICIES DEMANDING RESTORATION

Policyholders obviously need and deserve regulatory protection from tender offers that may threaten their security. They obviously have a real and legitimate interest in the future of their insurer. A "worst case" scenario suggests a successful offeror stripping the insurer of its liquid assets, leaving no surplus or reserves for the protection of policyholders. An offeror that is incompetent to manage an insurer or one that imprudently expands the insurer's operation, however, equally may threaten the policyholders' security. In either situation, the in-

portfolio in substantially overvalued securities of the Baldwin-United subsidiaries. Wall St. J., Feb. 14, 1984, at 1, col. 6. Obviously, the postacquisition financial regulations were ineffective to avert this major catastrophe. At least one insurance regulator stated that the fault lay in no small part with this after-the-fact type of regulation. *Id.* at 14, col. 2.

Apparently, the preacquisition review presumably performed by the commissioner also failed to avoid this problem. This Article does not suggest that preacquisition regulation is a panacea but only that financial regulations applied after the takeover are by themselves inadequate. See Dew, *supra* note 12, at 105 (noting that "despite what detractors argue, the tools available to [insurance] regulators after a change in control has occurred simply are not as efficient as those direct and indirect benefits inherent in a prior approval scheme"). But see *National City Lines, Inc. v. LLC Corp.*, 524 F. Supp. 906, 911-12 (W.D. Mo. 1981) (suggesting that postacquisition regulation is fully effective without prior approval), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982); Langevoort, *supra* note 152, at 252 n.254 (preferable for states to protect policyholders directly by attacking insurance company abuse rather than indirectly by regulating tender offers); Silberman, Kezsbom & Sacks, *supra* note 101, at 473 (state regulatory powers fully effective to protect valid state interests).

sureds are powerless to protect their interests. They must simply sit on the sidelines and observe the tender offer, the outcome of which may have a profound effect on their future. And none of the contestants, including the offeror, target management, and shareholders, are necessarily concerned with the policyholders' interests.¹⁸⁴

The vulnerability of policyholders is the justification for insurance regulation generally. It does not make sense to maintain substantial regulatory protections in all other facets of the policyholders' relationship with the insurer but abandon policyholders in a tender offer. When insurers are first incorporated or granted a certificate of authority to transact business in a state, the state usually does not rely exclusively on limitations on the insurer's manner of conducting business. Instead, the commissioner often has the right of prior approval.¹⁸⁵ The public and the policyholders are entitled to no less protection in the event of a tender offer for control of an insurer.

The rejection of the insurance takeover statutes as incompatible with the Williams Act does not constitute a rejection of their underlying purpose of policyholder protection.¹⁸⁶ Fortunately, despite the incompatibility of the state statutes and the Williams Act in their present form, the coexistence of regulatory protections for both policyholders and shareholders is not a theoretical inconsistency. Indeed, many federal statutes governing acquisitions of control of federally regulated industries protect interests similar to those of policyholders.¹⁸⁷ Whether

184. When confronted with a bid for control, management probably will act in its own self-interest. In this sense, management may be no more protective of the policyholder's interests than are the offeror or shareholders, despite management's duty to avoid actions adverse to these interests.

185. See, e.g., N.Y. INS. LAW § 1106 (McKinney 1984); OKLA. STAT. ANN. tit. 36, §§ 616, 2107 (West 1976).

186. See Note, *supra* note 12, at 284. Even courts finding that the insurance takeover laws do not regulate the "business of insurance," and are therefore outside the purview of the McCarran-Ferguson Act, recognize the importance of policyholder protection. See *National City Lines, Inc. v. LLC Corp.*, 524 F. Supp. 906, 910-12 (W.D. Mo. 1981), *aff'd on other grounds*, 687 F.2d 1122 (8th Cir. 1982).

187. See, e.g., Federal Savings and Loan Holding Company Act, 12 U.S.C. § 1730a (1982); Bank Holding Company Act, 12 U.S.C. § 1842 (1982); Federal Power Act, 16 U.S.C. §§ 797-808 (1982); Atomic Energy Act, 42 U.S.C. §§ 2131-2151 (1982); Federal Shipping Act, 46 U.S.C. § 835 (1982); Federal Communications Act, 47 U.S.C. § 310 (1982); Federal Aviation Act, 49 U.S.C. app. § 1378 (1982); Interstate Commerce Act, 49 U.S.C. § 11,343 (1982). For a discussion of the interrelationship between federal banking and securities laws, see Pitts & Cranmore, *Considerations Under the Federal Banking and Securities Laws with Respect to Bank Mergers or Takeovers*, 36 OKLA. L. REV. 789 (1983).

their objective is the safety of airline passengers¹⁸⁸ or the security of bank depositors,¹⁸⁹ these statutes are structured to safeguard persons who otherwise are vulnerable and without a voice during a tender offer contest. Each empowers the regulator to convene a hearing, to consider the substantive merits and impact of the acquisition, and to delay consummation pending decision,¹⁹⁰ thereby frustrating the "market approach" embodied by the Williams Act.¹⁹¹

These federal statutes, which bear a strong resemblance to state insurance takeover acts, are enforced regardless of their inconsistency with the Williams Act. At least with respect to federal statutes, therefore, conflicting requirements are tolerated when circumstances indicate that the protection of shareholders provided by the Williams Act is insufficient to protect other deserving parties.¹⁹² The tolerance of these federal stat-

188. Federal Aviation Act, 49 U.S.C. app. § 1378 (1982).

189. Bank Holding Company Act, 12 U.S.C. § 1842 (1982).

190. See statutes cited *supra* note 187. The SEC has indicated that it is not disturbed by these differences because the statutes condition the acquisition of control, but not the commencement of the tender offer, on regulatory approval. See Release No. 34-16,384, *supra* note 51, at 70,330, reprinted in [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584. The banking regulators appear to have accepted this rationale for reconciliation of their regulation. See Pitts & Cranmore, *supra* note 187, at 808 & n.120 (citing REPORT TO THE CONGRESS ON THE CHANGE IN BANK CONTROL ACT OF 1978, OFFICE OF THE COMPTROLLER OF THE CURRENCY 2 (Mar. 9, 1981)). In this respect the federal statutes are unlike the state insurance laws, which prohibit the initiation of the offer, not just its consummation, before regulatory approval. See *supra* notes 145-48 and accompanying text.

The "conditional offer" approach of these federal statutes, however, eliminates only the conflict with Rule 14d-2(b); it does not relieve the inconsistencies with the policy of the Williams Act. These statutes all permit substantial postponement of the acquisition of control. For certain acquisitions of control of rail carriers, the Interstate Commerce Act provides for published notice within 30 days, completion of evidentiary hearings within 24 months of such publication, and final decision by the Commission no later than 180 days after the conclusion of the hearing. See 49 U.S.C. § 11,345(a), (b) (1982). The Bank Holding Company Act permits the Federal Reserve Board of Governors to make a decision as late as 151 days after the initial application plus the time required for the hearing itself, with no limit on the duration of the hearing. See 12 U.S.C. § 1842(a), (b) (1982). Approvals of acquisitions of control under the Federal Aviation Act are not constrained by any statutory deadline. See 49 U.S.C. § 1378(b) (1982). The substantial delays in the offer's consummation made possible by these federal statutes add considerably to the arsenal of the target's management and can be just as detrimental to the offeror as statutes delaying the offer's commencement. Consequently, these statutes upset the careful balance of neutrality between offeror and management constructed by the Williams Act. See *supra* notes 151-57 and accompanying text.

191. See *supra* notes 162-64 and accompanying text.

192. These federal statutes, of course, do not face the constitutional impedi-

utes demonstrates the compatibility of protective policies, such as the goal of protecting policyholders, with the shareholder protection objective underlying the Williams Act.

Arguably, however, the intent of Congress to have the Williams Act regulate insurance takeovers precludes state laws protecting policyholders even if those laws do not conflict with other policies and provisions of the Williams Act. By its express terms, the Williams Act extends to tender offers for and acquisitions of, *inter alia*, "any equity security of an insurance company which would have been required to be so registered [under section 12 of the Exchange Act] except for the exemption contained in section 78l(g)(2)(G)."¹⁹³ This provision can be interpreted to require supremacy clause preemption of *all* state regulation of insurance company tender offers, including regulations securing policyholder protections. Although such an interpretation is reasonable if the Act's language is taken at face value, it is negated by the legislative history of the provision.

As originally enacted in 1968, the Williams Act applied only to tender offers for securities registered pursuant to section 12 of the Exchange Act.¹⁹⁴ In 1964, Congress had exempted insurers from section 12 registration, and thus from the Exchange Act's disclosure, proxy, and insider trading provisions, if the domiciliary state provided adequate regulation in those areas.¹⁹⁵ Thus, the Williams Act originally did not apply

ments posed by the commerce and supremacy clauses. Whether inconsistency with the Williams Act affects the enforceability of these federal statutes is, instead, a matter of statutory construction. It certainly is incongruous, however, to allow these regulatory statutes to continue to operate while simultaneously invalidating the similar insurance laws simply because the former are federal acts and the latter are state acts. This result approaches the point of absurdity in view of Congress's delegation to the states of its power over insurance in the McCarran-Ferguson Act. *See supra* notes 61-67 and accompanying text.

193. Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1982); *see also id.* § 13(d)(1), 15 U.S.C. § 78m(d)(1) (extending reporting requirements to purchasers who become five percent beneficial owners of insurance company stock).

194. Williams Act, Pub. L. No. 90-439, sec. 3, Exchange Act § 14(d)(1), 82 Stat. 454, 456 (codified as amended at 15 U.S.C. 78n(d)(1) (1982)).

195. *See* Securities Acts Amendment of 1964, sec. 3(c), Exchange Act § 12(g)(2)(G), Pub. L. No. 88-467, 78 Stat. 565, 567-68 (codified at 15 U.S.C. § 78l(g)(2)(G) (1982)). The objective of the exemption was to avoid multiple regulation by the state and federal governments and to conform to "the doctrine embodied in the McCarran Act that the regulation of insurance companies be left to the States." H.R. REP. NO. 1418, 88th Cong., 2d Sess. 10, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3013, 3022. This objective was echoed during the House and Senate floor debates. *See, e.g.*, 110 CONG. REC. 17,917 (1964) (statement of Rep. Harris); *id.* at 17,921-22 (statement of Rep.

to tender offers for the securities of insurers domiciled in states having such regulation. At the behest of insurers fearful of takeovers,¹⁹⁶ however, Congress amended the Williams Act in 1970 to include the specific language covering acquisitions of control of insurers.¹⁹⁷

The legislative history of the 1970 amendments suggests that Congress's motivation in broadening the coverage of the Williams Act was not to repudiate the policy embodied in the 1964 amendments of giving states the primary responsibility to regulate insurance security transactions, but rather to fill a regulatory void caused by a *lack* of state regulation of insurance takeovers.¹⁹⁸ The specific reference in the Williams Act to tender offers for insurance company securities, therefore, does not represent a policy declaration that only federal regulation can adequately deal with such offers. Rather, the proliferation of state insurance takeover statutes extinguishes the reason underlying this language.¹⁹⁹ Indeed, the policy embodied in the 1964 amendments of allowing states to regulate certain securities law matters supports the view that the states should have

Spring); *id.* at 18,183 (statement of Rep. Pickle); *id.* at 18,383 (statement of Sen. Javits).

196. See Weilder, *Regulation of the Insurance Industry Under the Proposed Federal Securities Code*, 7 CONN. L. REV. 711, 718 (1975).

197. See Act of Dec. 22, 1970, Pub. L. 91-567, sec. 3, Exchange Act § 14(d)(1), 84 Stat. 1497, 1497 (codified at 15 U.S.C. § 78n(d)(1) (1982)).

198. The Senate Banking and Currency Committee explained:

The bill does not seek to disturb the decision reached in 1964 to leave periodic reporting, proxy solicitation and regulation of insider trading with respect to securities of insurance companies to the appropriate State authorities. However, in view of the nationwide basis of most tender offers and the fact that such offers are not presently regulated by State insurance commissioners, it appears appropriate to the committee to bring within the purview of sections 13(d) and 14(d) acquisitions of insurance company securities.

S. REP. NO. 1125, 91st Cong., 2d Sess. 2, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5025, 5027 (emphasis added). Practically identical explanations for the adoption of the 1970 amendments appear in the House Interstate and Foreign Commerce Committee report, H.R. REP. NO. 1655, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5025, 5027, and the comments of the principal congressional architect of the original legislation, 116 CONG. REC. 29,252 (1970) (statement of Sen. Williams).

199. The National Association of Insurance Commissioners adopted the Model Act in 1969, one year before Congress amended the Williams Act. Within a matter of years, almost every state adopted some sort of regulation governing the acquisition of control of insurers. See *supra* notes 11-13 and accompanying text. Since these statutes generally favor the target insurer more than does the Williams Act, see *supra* notes 151-64 and accompanying text, it is doubtful whether those insurers that originally recommended the extension of federal regulation to insurance takeovers would do so today.

the primary responsibility for insurance takeovers.²⁰⁰

The absence of any policy disfavoring state protection of policyholders in a tender offer is confirmed indirectly by several additional sources. First, the Federal Securities Code, proposed by the American Law Institute and endorsed by the Securities and Exchange Commission,²⁰¹ would expressly preempt any state law regulating tender offers or takeover bids "that is not limited to a regulated industry."²⁰² Since insurance takeover statutes are so limited,²⁰³ they fall within the preemption exception. The inclusion of this exemption from an otherwise all-encompassing preemption implicitly recognizes that reasonable state regulation of insurance takeovers is justified and should continue despite conflicts with the pattern of federal regulation.²⁰⁴

Second, the report of the SEC Advisory Committee on Tender Offers broadly endorsed state regulation of tender offers for insurers.²⁰⁵ Recommendation 9(c) states:

200. In 1970, the SEC questioned whether individual states could adequately regulate nationwide tender offers and, on that basis, distinguished tender offer regulation from those securities matters left to the states under the 1964 amendments. See H.R. REP. NO. 1655, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5025, 5032-33. Throughout the ensuing debate over federal versus state regulation of general business takeovers, however, the power of the state to regulate the transaction was not doubted except in the constitutional sense. The power of an insurance commissioner should certainly be no less than that of a state corporation commissioner or secretary of state.

201. See Exchange Act Release No. 17,153, *reprinted in* [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,655 (Sept. 18, 1980) (announcing Commission's support of Federal Securities Code); Exchange Act Release No. 18,437, *reprinted in* [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,090 (Jan. 21, 1982) (reaffirming support of Code).

202. FEDERAL SECURITIES CODE § 1904(c)(1) (1978).

203. See *id.* § 1904(c) comment 10(c).

204. There is some ambiguity about whether § 1904(c)(1) would completely avoid preemption of the state insurance takeover statutes. Section 1904(j)(1) states that "except as provided in sections 917(a) and (b), 1819(j)(7), 1904(a) to (e) inclusive, and 1906, nothing in this Code (as defined in section 202(24)) affects the application of State law to any security, transaction, or person to the extent that it does not conflict with this Code (as so defined)." *Id.* § 1904(j)(1). This provision could be interpreted to mean that state insurance provisions, like any other state laws, are still subject to preemption to the extent they conflict with the Code because § 1904(c) does not expressly preempt such provisions. This result, however, would render the exemption from express preemption meaningless; inconsistencies between the Code and state regulation of tender offers are inevitable. The Code should be interpreted to tolerate the state insurance laws despite their conflict with the Code's regulation of tender offers.

205. See SEC ADVISORY COMMITTEE ON TENDER OFFERS, REPORT OF REC.

Federal takeover regulation should not preempt substantive state regulation of banks, utilities, insurance companies and similar businesses, where the change of control provisions of such state regulation are justified in relation to the overall objectives of the industry being regulated, do not conflict with the procedural provisions of federal takeover regulation and relate to a significant portion of the issuer's business.²⁰⁶

Moreover, Recommendation 34 recognizes that despite the burdens on interstate commerce that often result from state takeover statutes, such statutes are nonetheless justified in certain regulated industries when vital to the interests that state regulation was intended to protect.²⁰⁷

Third, Daniel L. Goelzer, General Counsel of the SEC, has recognized the unique policies underlying statutes governing takeovers of regulated businesses such as insurance. In an August 6, 1984, program sponsored by the ABA Committee on State Regulation of Securities, Mr. Goelzer indicated that these statutes are valid even after *Edgar* if they affect traditional areas of state concern and are narrowly drawn to avoid unnecessarily burdening interstate commerce.²⁰⁸

RECOMMENDATIONS (July 8, 1983), *reprinted in* REPRESENTING PUBLICLY TRADED CORPORATIONS, 1984, at 667 (Corp. L. & Prac. Course Handbook Series, no. 447) (K. Eppler & T. Gilroy, cochairmen 1984) [hereinafter cited as REPRESENTING PUBLICLY TRADED CORPORATIONS].

206. *Id.* Recommendation 9(c), at 18, *reprinted in* REPRESENTING PUBLICLY TRADED CORPORATIONS, *supra* note 205, at 669.

207. Specifically, Recommendation 34 provides:

State laws and regulations, regardless of their form, that restrict the ability of a company to make a tender offer should not be permitted because they constitute an undue burden on interstate commerce. Included in this category should be statutes that prohibit completion of a tender offer without target company shareholder approval and broad policy legislation written so as to impair the ability to transfer corporate control in a manner and time frame consistent with the federal tender offer process.

An exception to this basic prohibition may be appropriate where a significant portion of the target company is in a regulated industry and where special change of control provisions are vital to the achievement of ends for which the industry is regulated.

Id. Recommendation 34, at 35-36, *reprinted in* REPRESENTING PUBLICLY TRADED CORPORATIONS, *supra* note 205, at 673.

The SEC concurs with Recommendations 9(c) and 34. See *Takeover Tactics and Public Policy: Hearings Before the Subcomm. on Telecommunication, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 13, 23, 34-35 (1984) (statement of John Shad, SEC Chairman), *reprinted in* REPRESENTING PUBLICLY TRADED CORPORATIONS, *supra* note 205, at 680, 690, 701-02.

208. See 16 SEC. REG. & L. REP. (BNA) 1394, 1394-95 (August 17, 1984) (containing a brief summary of the statements of the various panelists at the meeting). Mr. Goelzer introduced his remarks with the usual disclaimer that

These three sources all indicate that states can continue to regulate insurance takeovers, but their analysis does not overcome the constitutional infirmities of the insurance statutes or reconcile the state statutes with the Williams Act. Instead, the conclusion of each apparently is based on an acknowledgement that the statutes should survive notwithstanding minor discrepancies with the federal regulatory scheme because they provide essential protections that are unavailable elsewhere. The message of these sources, therefore, is that policyholders need and deserve protection and should not be abandoned simply because of an inconsistent federal regulation designed for an entirely different purpose.

B. SUGGESTIONS FOR REFORM

Several different avenues of legislative reform are available to restore policyholder protection in tender offers. Although some possible revisions of present law are either unrealistic or too simplistic to provide any appreciable protection, others provide an acceptable balance between the federal interest in shareholder protection and the state goal of policyholder protection.

1. Abridge State Statutes to Avoid Conflict with the Williams Act

The least complicated method of preserving the constitutionality of state insurance takeover statutes is to excise those provisions conflicting with the Williams Act.²⁰⁹ Although this approach avoids the constitutional infirmities of these statutes, it also removes all semblance of their policyholder protections. Without a hearing on the effect of the takeover on the insurer's policyholders or the insurance commissioner's independent review of the offer's merits, the takeover statutes would be reduced to mere disclosure statutes. Because policyholders have

he was not speaking for the Commission. During the same program, which, incidentally, the author attended, Mr. Robert M. Royalty, of the Atlanta office of Sutherland, Asbill & Brennan, concluded that state takeover statutes pertaining to regulated industries, particularly the insurance statutes, were legally in good shape despite *Edgar*.

209. Several states attempted to preserve their general business takeover statutes in this manner. See 3B H. BLOOMENTHAL, SECURITIES AND FEDERAL CORPORATE LAW § 13.34[2] (rev. 1984); 1 M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS § 5.02[4][d] (1984); Sargent, *supra* note 144, at 708-12; Veasey, *State Takeover Statutes*, 13 ANN. INST. ON SEC. REG. (PLI) 85, 87 (1981).

no power to accept or reject the offer, disclosure to policyholders is ineffective to protect their interests.²¹⁰

The state legislatures could attempt to rectify this flaw by coupling the disclosure requirements with provisions empowering policyholders to participate in the offer. In an effort to save their general business takeover statutes, for example, some states now require that offers first be submitted to a shareholder vote if the offeror could acquire a defined percentage of the target's outstanding securities.²¹¹ Similarly, the insurance takeover statutes could require that an offer be approved by a vote of policyholders before consummation. Unfortunately, however, although this approach theoretically eliminates the need for a hearing and commissioner review by giving the policyholders the ability to protect their own interests, it would not adequately protect policyholders. For the most part, policyholders are not investors and, as a group, cannot be expected to possess the necessary business and financial acumen to use the required disclosures to evaluate the implications of the offer. Unlike shareholders, who assume the risk of investment decisions, policyholders do not intend to undertake an investment risk by purchasing a policy. Indeed, they purchase the policy to avoid, rather than assume, risk. To force ill-prepared policyholders into these investment decisions would seriously undermine the public's confidence in the ability of the insurance industry to assure future security. Policyholders simply require a more paternalistic type of regulatory protection than do shareholders.

2. Permit Conditional Offers

Another alternative would be to amend the state statutes to expressly permit an offer conditioned on regulatory approval.²¹² The statutes then would be indistinguishable from

210. See *supra* notes 175-76 and accompanying text.

211. Ohio was the first state to adopt this approach, see Act of Nov. 19, 1982, § 1, 1983 Ohio Legis. Bull. 1, 3-4, 8-9 (Anderson) (codified at OHIO REV. CODE ANN. §§ 1701.01(Z), .831 (Page Supp. 1983)), and Wisconsin has enacted a similar provision, see Act of Apr. 18, 1984, No. 200, §§ 7(3), (4)(b), 1984 Wis. Legis. Serv. 1789, 1790-91 (West) (codified at WIS. STAT. ANN. §§ 180.69(3), (4)(b) (West Supp. 1984)), although both statutes permit waiver of this requirement in the issuer's articles or regulations. See generally Kreider, *Fortress Without Foundation? Ohio Takeover Act II*, 52 U. CIN. L. REV. 108, 119-23 (1983) (no safe prediction regarding constitutionality of Ohio takeover statute); Profusek & Gompf, *supra* note 7, at 31-36 (Ohio-type statute probably constitutional because it does not expressly or implicitly conflict with federal law).

212. Most state insurance laws now require that the regulatory approval

federal laws with which the SEC has anticipated no conflict.²¹³ As noted earlier, however, the conditional offer format still would conflict with the policies underlying the Williams Act. By permitting substantial delays in the consummation of the offer, the hearing and regulatory approval provisions upset the Act's balance of neutrality between the offeror and incumbent management.²¹⁴ By itself, therefore, an amendment permitting conditional offers will not avoid the statutes' preemption.

3. Exempt State-Regulated Insurance Takeovers from the Williams Act

A more effective approach would be to amend the Williams Act to exclude from its scope tender offers for control of insurers when state insurance laws already regulate such offers. This amendment would not simply return the Act to the status quo existing before the 1970 amendments extended its coverage to tender offers for insurance company securities.²¹⁵ Instead, it would exempt offers for insurance company securities *only* when the offer itself is regulated by state insurance laws.²¹⁶ The Williams Act still would apply to insurers domiciled in states that do not regulate such offers and to offers that would not result in transfer of control of the insurer. Such an amendment would be a better resolution than the other alternatives described above because an express exception in the Williams Act would eliminate any danger of preemption. If Congress specifically authorizes a contradictory scheme under state law, it can hardly be said that the state law frustrates congressional purposes and objectives.

Even this solution, however, is not ideal because, in the guise of restoring policyholder protection, it also places insurance company shareholder protection in the hands of the states. Although the states may be better able than the federal government to appreciate and protect the interests of policyholders, there is no reason to believe that they are as well-equipped to deal with shareholder protection. This problem is magnified in

precede commencement, not just consummation, of the offer. See *supra* notes 145-46 and accompanying text.

213. See Exchange Act Release No. 34-16,384, *supra* note 51, at 70,330, reprinted in [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,373, at 82,584.

214. See *supra* notes 151-57 and accompanying text.

215. See *supra* notes 193-97 and accompanying text.

216. In this respect, the suggested amendment is similar to the 1964 amendments discussed *supra* note 195 and accompanying text.

the case of a tender offer for an insurance holding company rather than for the insurer itself. The protection of policyholders of the subsidiary insurer is still a legitimate state concern because of the potential transfer of control of the insurer, but beyond that it is difficult to justify state insurance department intervention in the conduct of a tender offer for the shares of a noninsurer.

4. Divide Responsibilities Between State and Federal Regulators

The best resolution is to divide between state and federal agencies the regulatory responsibilities relating to the acquisition of control of an insurer. Protection of insurers' policyholders would remain with the states, but shareholders of the insurer would continue to be protected by the Williams Act and, to the extent possible, be treated the same as shareholders in other corporate takeovers. In other words, both regulatory schemes would operate simultaneously. This result, of course, requires action from both the state legislatures and Congress.

On the state level, the insurance takeover statutes should be amended to delete provisions designed exclusively for shareholder protection,²¹⁷ including those provisions not mentioning shareholders but that nevertheless are solely intended to protect shareholder interests.²¹⁸ In addition, the remaining provisions should be tailored to diminish interference with the Williams Act. Statutes that reach foreign insurers having significant contacts with the state²¹⁹ should be amended to apply only to domestic insurers in order to minimize the potential for

217. This modification would result in no protection for target corporation shareholders when the target insurer's equity securities are not registered under the 1934 Act. When the target insurer has neither securities listed on a national securities exchange nor 500 shareholders and \$3 million in assets, tender offers for its securities are not governed by the Williams Act. See Exchange Act §§ 12(g)(1), 14(d)(1), 15 U.S.C. §§ 78l(g)(1), 78n(d)(1) (1982); Rule 12g-1, 17 C.F.R. § 240.12g-1 (1984). The suggested amendment therefore would leave shareholders totally unprotected in such offers unless the state business takeover law applied. To avoid this omission, the state insurance or corporate laws could be amended further to extend takeover regulation to these offers. Since Congress did not think it necessary to extend Williams Act protection to shareholders of smaller, unregistered general business corporations, however, perhaps there is no need for states to provide comparable protection to shareholders of smaller, unregistered insurers.

218. See MODEL ACT, *supra* note 11, § 3(b)(9), (11); *supra* note 82 and accompanying text.

219. See *supra* note 102 and accompanying text.

duplicative state proceedings.²²⁰ Instead of permitting all affected parties to intervene,²²¹ state statutes should give them the limited right to file *amicus curiae* memoranda with the commissioner. The timetable for commencement of the public hearing and for the commissioner's decision should be expedited to reduce delays, which inevitably favor those opposed to the offer.²²² The hearing itself, which presently does not have a completion deadline under the Model Act and many state statutes,²²³ should be given a maximum duration. The entire process should have a deadline of sixty days to enable an offeror receiving a favorable decision from the commissioner to commence purchasing tendered shares before the shareholders' withdrawal right matures.²²⁴

220. The Model Act already contains some provisions that minimize its interference with the Williams Act. For example, it allows the offeror to use its federal disclosure statements to the extent that they contain information required by the Model Act, thereby avoiding delay in the preparation of duplicative disclosures. See MODEL ACT, *supra* note 11, § 3(c). Also, the definition of "domestic insurer" includes an insurance holding company only if it is primarily engaged in the business of insurance. See *id.* § 3(a)(1). Consequently, acquisition of an insurance holding company is not subject to the Act if the insurance business constitutes only a relatively small portion of the target's overall enterprise.

221. See, e.g., MODEL ACT, *supra* note 11, § 3(d)(2).

222. The Model Act currently requires the commissioner to give the offeror at least 20 days' notice of the hearing. See MODEL ACT, *supra* note 11, § 3(d)(2). Since the offeror should anticipate the hearing in any event, this notice period seems clearly excessive. On the other hand, shortening the notice period should be tempered by the realization that the opportunity for effective discovery also will be reduced. For a sampling of existing timetables for commencement and decision, see *supra* note 153.

223. See, e.g., MODEL ACT, *supra* note 11, § 3(d)(2); GA. CODE ANN. § 33-13-3(f) (1982); KAN. STAT. ANN. § 40-3304(d) (Supp. 1983); MICH. COMP. LAWS ANN. § 500.1315(2) (West 1983); MINN. STAT. § 60D.02(4)(2) (1984); NEV. REV. STAT. § 692C.210 (1979); S.D. CODIFIED LAWS ANN. §§ 58-5A-10, -12 (1978).

224. The Williams Act permits shareholders to withdraw shares that have been tendered but not yet purchased at any time after 60 days from the date the offer was commenced. See Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1982). Because federal law thus permits the offeror to hold tendered shares for that period of time, a state proceeding completed within 60 days does not intrude significantly into the operation of the federal scheme. New York has taken a step to minimize conflict with the Williams Act by amending its general business takeover law to provide that an attorney general's temporary order prohibiting the offeror from purchasing any tendered shares cannot extend longer than 55 days after filing of the registration statement. See Act of June 30, 1980, ch. 733, sec. 2, § 1605(b), 1980 N.Y. Laws 1869, 1869 (codified at N.Y. BUS. CORP. LAW § 1605(b) (McKinney Supp. 1984-1985)). Even with such an amendment, however, some conflicts with the rules promulgated under the Williams Act remain. The rules, for example, permit the offeror to begin purchasing tendered shares within 20 days. See Rule 14e-1(a), 17 C.F.R.

On the federal level, Congress could amend the Williams Act to provide that it does not preempt state statutes protecting policyholders, but not shareholders, in connection with any offer for or acquisition of control of an insurer. Although this division makes sense theoretically, it would provoke controversy over whether the state statute provides only policyholder, and no shareholder, protections. Such ambiguity undoubtedly would encourage incumbent management threatened with a hostile offer to litigate this issue with vigor and thereby create further delay. Furthermore, this amendment would have to contain a specific and easily applied definition of control in order to identify the insurance statutes it exempts and avoid additional delay in litigating that issue.²²⁵

To avert these interpretive difficulties, Congress instead should adopt a more clear-cut amendment to the Williams Act stating that offers for insurers or insurance holding companies that are conditioned on state regulatory approval by the insurance commissioner of the insurer's domiciliary state are permissible and not preempted by the Act.²²⁶ It should further specify, however, that the Williams Act and the rules promulgated thereunder continue to apply to such offers to the extent that they do not interfere with the insurance regulator's responsibilities under state law. This amendment would allow states to enforce their policyholder protections while retaining the essentials of the Williams Act for shareholder protection. It assumes, of course, cooperation by the states in narrowing their takeover statutes as suggested above to concentrate solely on policyholder protection and to reduce conflicts with the Williams Act.²²⁷ For instance, state insurance laws would have to be modified to require that consummation, but not commencement, of offers be delayed pending regulatory approval.²²⁸

§ 240.14e-1(a) (1984). Such minor conflicts should be tolerated, however, to allow states to perform their traditional function of policyholder protection.

225. The amendment could be patterned after the insurance holding company acts, which often presume "control" if the offeror could acquire 10% of the target's outstanding shares. See MODEL ACT, *supra* note 11, § 1(c); statutes cited *supra* note 15. Such a presumption, however, would not preclude dilatory litigation over whether the presumption is rebutted in an individual case.

226. This amendment would overcome the obstacles to the "conditional offer" format caused by the Williams Act goal of neutrality and its market approach. See *supra* notes 151-64 and accompanying text. Delay in the consummation of an offer cannot frustrate federal law when Congress expressly authorizes the delay.

227. See *supra* notes 217-24 and accompanying text.

228. As presently worded, the Model Act and most state holding company acts prohibit making an offer before approval by the insurance commissioner.

Allowing the Williams Act and the state insurance takeover statutes to operate simultaneously to achieve the goals of each clearly is a compromise. As a result, it would, to a certain degree, impair the effectiveness of both regulatory schemes and undermine the carefully constructed neutrality of the Williams Act. It also would reduce the state insurance commissioner's opportunity to make a scrupulous, unhurried determination following a hearing. Nevertheless, this solution protects both shareholders and policyholders. Shareholders would receive the information necessary to make an informed decision, and the policyholders' security would be safeguarded by the commissioner's independent review.²²⁹

Conclusion

Despite their legitimate purpose of policyholder protection, state laws regulating the acquisition of control of domestic insurers are preempted by the Williams Act and thus are unconstitutional under the supremacy clause. This result, however, is not dictated by a federal policy against policyholder protection but only by the conflicts in the operation of the two bodies of law. The present state of the law therefore creates the entirely unintended result of abandoning policyholder interests when control of the insurer is transferred. Federal and state authorities should put aside their parochial concerns and divide the regulatory responsibilities with respect to takeovers in order to restore protection for policyholders while preserving it for shareholders.

See supra notes 145-48 and accompanying text. The amendment should require, not just permit, conditional offers so as to preclude offerors from precipitating a constitutional confrontation between state and federal law by making an unconditional offer. *See supra* notes 149-50 and accompanying text.

229. The greatest obstacle to the proposed solution is its complexity. It requires numerous, thoughtful amendments to both the Williams Act and the state insurance takeover laws. Its success, therefore, demands cooperative action by Congress and 50 state legislatures. Given the improbability of that level of collaboration, a more realistic though less desirable alternative may be simply to exclude insurance takeovers from the Williams Act. *See supra* notes 215-16 and accompanying text.

APPENDIX*

Section 3. *Acquisition of Control of or Merger with Domestic Insurer*

- (a) *Filing Requirements.* No person other than the issuer shall make a tender offer for or a request or invitation for tenders of, or enter into any agreement to exchange securities for, seek to acquire, or acquire, in the open market or otherwise, any voting security of a domestic insurer if, after the consummation thereof, such person would, directly or indirectly (or by conversion or by exercise of any right to acquire) be in control of such insurer, and no person shall enter into an agreement to merge with or otherwise to acquire control of a domestic insurer unless, at the time any such offer, request, or invitation is made or any such agreement is entered into, or prior to the acquisition of such securities if no offer or agreement is involved, such person has filed with the Commissioner and has sent to such insurer, and such insurer has sent to its shareholders, a statement containing the information required by this section and such offer, request, invitation, agreement or acquisition has been approved by the Commissioner in the manner hereinafter prescribed.
- (1) For purposes of this section: a domestic insurer shall include any other person controlling a domestic insurer unless such other person is either directly or through its affiliates primarily engaged in business other than the business of insurance.
- (b) *Content of Statement.* The statement to be filed with the Commissioner hereunder shall be made under oath or affirmation and shall contain the following information:
- (1) The name and address of each person by whom or on whose behalf the merger or other acquisition of control referred to in subsection (a) is to be effected (hereinafter called "acquiring party"), and
- (i) if such person is an individual, his principal occupation and all offices and positions held during the past five years, and any conviction of crimes other than minor traffic violations during the past ten years;

* MODEL ACT, *supra* note 11, § 3.

- (ii) if such person is not an individual, a report of the nature of its business operations during the past five years or for such lesser period as such person and any predecessors thereof shall have been in existence; an informative description of the business intended to be done by such person and such person's subsidiaries; and a list of all individuals who are or who have been selected to become directors or executive officers of such person, or who perform or will perform functions appropriate to such positions. Such list shall include for each such individual the information required by paragraph (i) of this subsection.
- (2) The source, nature and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a description of any transaction wherein funds were or are to be obtained for any such purpose, and the identity of persons furnishing such consideration, provided, however, that where a source of such consideration is a loan made in the lender's ordinary course of business, the identity of the lender shall remain confidential, if the person filing such statement so requests.
- (3) Fully audited financial information as to the earnings and financial condition of each acquiring party for the preceding five fiscal years of each such acquiring party (or for such lesser period as such acquiring party and any predecessors thereof shall have been in existence), and similar unaudited information as of a date not earlier than 90 days prior to the filing of the statement.
- (4) Any plans or proposals which each acquiring party may have to liquidate such insurer, to sell its assets or merge or consolidate it with any person, or to make any other material change in its business or corporate structure or management.
- (5) The number of shares of any security referred to in subsection (a) which each acquiring party proposes to acquire, and the terms of the offer, request, invitation, agreement, or acquisition referred to in subsection (a), and a statement as to

the method by which the fairness of the proposal was arrived at.

- (6) The amount of each class of any security referred to in subsection (a) which is beneficially owned or concerning which there is a right to acquire beneficial ownership by each acquiring party.
- (7) A full description of any contracts, arrangements or understandings with respect to any security referred to in subsection (a) in which any acquiring party is involved, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies. Such description shall identify the persons with whom such contracts, arrangements or understandings have been entered into.
- (8) A description of the purchase of any security referred to in subsection (a) during the twelve (12) calendar months preceding the filing of the statement, by any acquiring party, including the dates of purchase, names of the purchasers, and consideration paid or agreed to be paid therefor.
- (9) A description of any recommendations to purchase any security referred to in subsection (a) made during the twelve (12) calendar months preceding the filing of the statement, by any acquiring party, or by anyone based upon interviews or at the suggestion of such acquiring party.
- (10) Copies of all tender offers for, requests or invitations for tenders of exchange offers for, and agreements to acquire or exchange any securities referred to in subsection (a), and (if distributed) of additional soliciting material relating thereto.
- (11) The terms of any agreement, contract or understanding made with any broker-dealer as to solicitation of securities referred to in subsection (a) for tender, and the amount of any fees, commissions or other compensation to be paid to broker-dealers with regard thereto.
- (12) Such additional information as the Commissioner may by rule or regulation prescribe as necessary or appropriate for the protection of policyholders

and securityholders of the insurer or in the public interest.

If the person required to file the statement referred to in subsection (a) is a partnership, limited partnership, syndicate or other group, the Commissioner may require that the information called for by clauses (1) through (12) shall be given with respect to each partner of such partnership or limited partnership, each member of such syndicate or group, and each person who controls such partner or member. If any such partner, member or person is a corporation or the person required to file the statement referred to in subsection (a) is a corporation, the Commissioner may require that the information called for by clauses (1) through (12) shall be given with respect to such corporation, each officer and director of such corporation, and each person who is directly or indirectly the beneficial owner of more than ten (10) percent of the outstanding voting securities of such corporation.

If any material change occurs in the facts set forth in the statement filed with the Commissioner and sent to such insurer pursuant to this section, an amendment setting forth such change, together with copies of all documents and other material relevant to such change, shall be filed with the Commissioner and sent to such insurer within two business days after the person learns of such change. Such insurer shall send such amendment to its shareholders.

- (c) *Alternative Filing Materials.* If any offer, request, invitation, agreement or acquisition referred to in subsection (a) is proposed to be made by means of a registration statement under the Securities Act of 1933 or in circumstances requiring the disclosure of similar information under the Securities Exchange Act of 1934, or under a state law requiring similar registration or disclosure, the person required to file the statement referred to in subsection (a) may utilize such documents in furnishing the information called for by that statement.
- (d) *Approval by Commissioner; Hearings.*

- (1) The Commissioner shall approve any merger or other acquisition of control referred to in subsection (a) unless, after a public hearing thereon, he finds that:
 - (i) After the change of control the domestic insurer referred to in subsection (a) would not be able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed;
 - (ii) the effect of the merger or other acquisition of control would be substantially to lessen competition in insurance in this state or tend to create a monopoly therein;
 - (iii) the financial condition of any acquiring party is such as might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders or the interests of any remaining security holders who are unaffiliated with such acquiring party;
 - (iv) the terms of the offer, request, invitation, agreement or acquisition referred to in subsection (a) are unfair and unreasonable to the securityholders of the insurer;
 - (v) the plans or proposals which the acquiring party has to liquidate the insurer, sell its assets or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest; or
 - (vi) the competence, experience and integrity of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control.
- (2) The public hearing referred to in clause (1) shall be held within 30 days after the statement required by subsection (a) is filed, and at least 20 days' notice thereof shall be given by the Commissioner to the person filing the statement. Not less than 7 days' notice of such public hearing shall be

given by the person filing the statement to the insurer and to such other persons as may be designated by the Commissioner. The insurer shall give such notice to its securityholders. The Commissioner shall make a determination within 30 days after the conclusion of such hearing. At such hearing, the person filing the statement, the insurer, any person to whom notice of hearing was sent, and any other person whose interests may be affected thereby shall have the right to present evidence, examine and cross-examine witnesses, and offer oral and written arguments and in connection therewith shall be entitled to conduct discovery proceedings in the same manner as is presently allowed in the _____ Court of this state. All discovery proceedings shall be concluded not later than 3 days prior to the commencement of the public hearing.

- (e) *Mailings to Shareholders; Payment of Expenses.* All statements, amendments, or other material filed pursuant to subsection (a) or (b), and all notices of public hearings held pursuant to subsection (d), shall be mailed by the insurer to its shareholders within five business days after the insurer has received such statements, amendments, other material, or notices. The expenses of mailing shall be borne by the person making the filing. As security for the payment of such expenses, such person shall file with the Commissioner an acceptable bond or other deposit in an amount to be determined by the Commissioner.
- (f) *Exemptions.* The provisions of this section shall not apply to:
 - (i) any offers, requests, invitations, agreements or acquisitions by the person referred to in subsection (a) of any voting security referred to in subsection (a) which, immediately prior to the consummation of such offer, request, invitation, agreement or acquisition, was not issued and outstanding;
 - (ii) [any transaction which is subject to the provisions of sections _____ and _____ of the laws of this state, dealing with the merger or consolidation of two or more insurers;]⁴

4. Optional for use in those states where existing law adequately governs

- (iii) Any offer, request, invitation, agreement or acquisition which the Commissioner by order shall exempt therefrom as (1) not having been made or entered into for the purpose and not having the effect of changing or influencing the control of a domestic insurer, or (2) as otherwise not comprehended within the purposes of this Section.
- (g) *Violations.* The following shall be violations of this Section:
 - (i) The failure to file any statement, amendment, or other material required to be filed pursuant to subsection (a) or (b); or
 - (ii) the effectuation or any attempt to effectuate an acquisition of control of, or merger with, a domestic insurer unless the Commissioner has given his approval thereto.
- (h) *Jurisdiction; Consent to Service of Process.* The courts of this State are hereby vested with jurisdiction over every person not resident, domiciled, or authorized to do business in this state who files a statement with the Commissioner under this section, and over all actions involving such person arising out of violations of this section, and each such person shall be deemed to have performed acts equivalent to and constituting an appointment by such a person of the Commissioner to be his true and lawful attorney upon whom may be served all lawful process in any action, suit or proceeding arising out of violations of this section. Copies of all such lawful process shall be served on the Commissioner and transmitted by registered or certified mail by the Commissioner to such person at his last known address.

